IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No. 672. Knott et al., Appts., v. St. Louis & San Francisco R. R. Co.
No. 673. St. Louis & San Francisco R. R. Co., App., v. Knott et al.
No. 674. Knott et al., Appts., v. Atchison, Topeka & Santa Fe Ry. Co.
No. 675. Atchison, Topeka & Santa Fe Ry. Co., App., v. Knott et al.
No. 676. Knott et al., Appts., v. Chicago, Rock Island & Pac. Ry. Co.
No. 676. Chicago, Rock Island & Pac. Ry. Co., App., v. Knott et al.
No. 680. Knott et al., Appts., v. St. Louis, Kan. C. & Colo. R. R. Co.
No. 681. St. Louis, Kan. C. & Colo. R. R. Co., App., v. Knott et al.
No. 682. Knott et al., Appts., v. Kansas City Southern Ry. Co.
No. 683. Kansas City Southern Ry. Co., App., v. Knott et al.
No. 684. Knott et al., Appts., v. St. Louis & Hannibal Ry. Co.
No. 685. St. Louis & Hannibal Ry. Co., App., v. Knott et al.
No. 690. Knott et al., Appts., v. Missouri, Kansas & Texas Ry. Co.
No. 691. Missouri, Kansas & Texas Ry. Co., App., v. Knott et al.
No. 698. Knott et al., Appts., v. K. C., Clinton & Springfield Ry. Co.
No. 699. K. C., Clinton & Springfield Ry. Co., App., v. Knott et al.
No. 700. Knott et al., Appts., v. Chicago Great Western Ry. Co. et al.
No. 701. Chicago Great Western Ry. Co. et al., Appts., v. Knott et al.

APPEALS AND CROSS-APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANTS IN THE APPEALS AND FOR APPELLEES IN THE CROSS-APPEALS.

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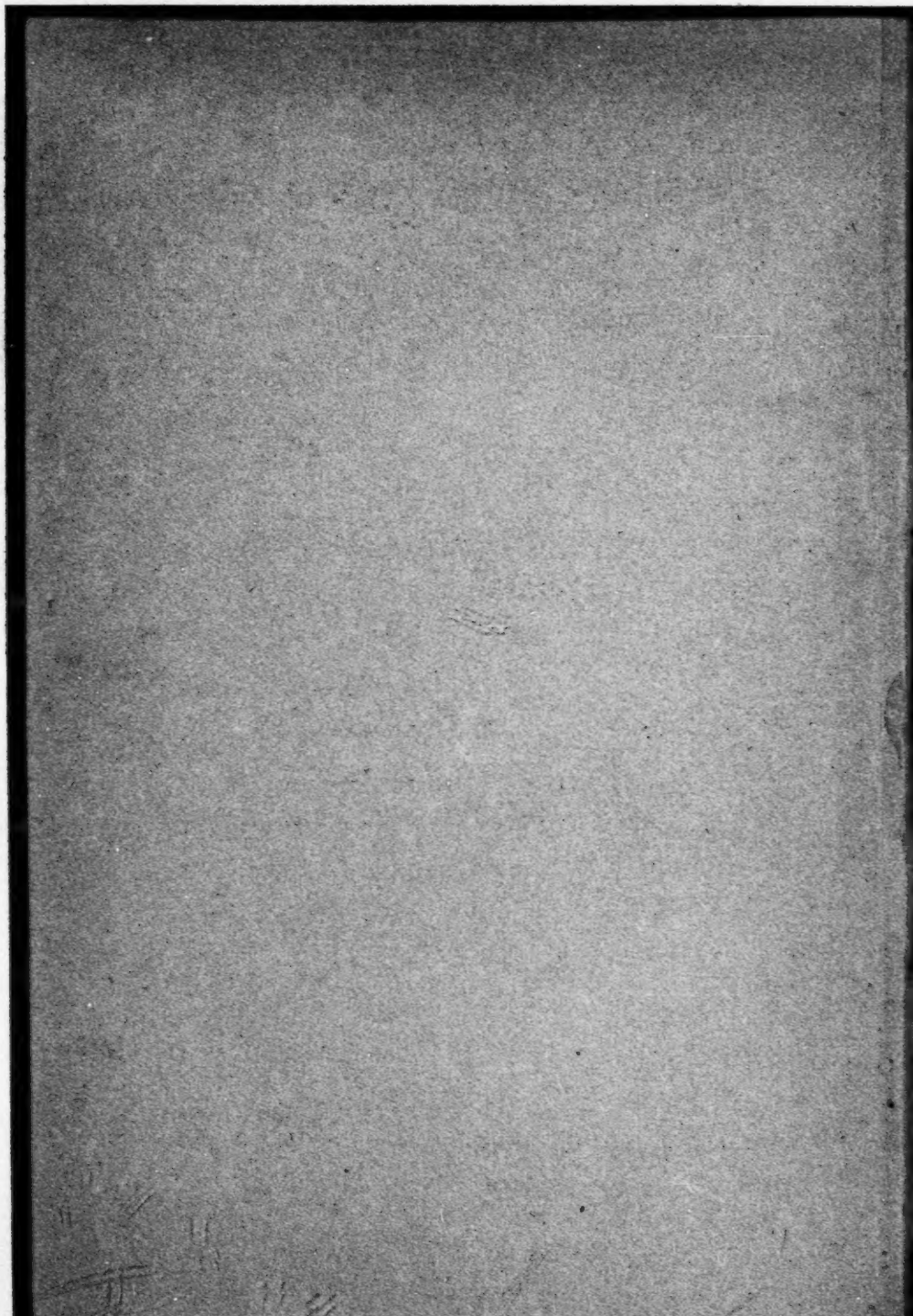

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No. 690. Knott et al., Appellants, v. Missouri, Kansas & Texas Railway Co.

No. 691. Missouri, Kansas & Texas Railway Co., Appellant, v. Knott et al.

No. 698. Knott et al., Appellants, v. Kansas City, Clinton & Springfield Ry. Co.

No. 699. Kansas City, Clinton & Springfield Ry. Co., Appellant, v. Knott et al.

No. 700. Knott et al., Appellants, v. Chicago Great Western Ry. Co. et al.

No. 701. Chicago, Great Western Ry. Co. et al., Appellants v. Knott et al.

APPEALS AND CROSS-APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANTS IN THE APPEALS AND FOR APPELLEES IN THE CROSS-APPEALS.

STATEMENT.

These appeals and cross-appeals like the Burlington cases, Nos. 130 and 134 of the present docket involve the constitutionality of certain maximum freight rate laws and the two-cent passenger fare law of the State of Missouri, full text of which is printed in the appendix to this brief. The railroads contend that said freight rate acts and said passenger act are unconstitutional and invalid for two principal reasons. First, because the said freight rate and passenger rate acts interfere with and are direct burdens upon interstate commerce and therefore impinge upon the provisions of section 8, article I of the Constitution of the United States; and second, because the maximum rates prescribed in said enactments do not afford reasonable returns upon the fair value of the properties employed and therefore are confiscatory and violative of the Fourteenth Amendment to the Constitution of the United States.

Judge Smith McPherson, before whom the cases were tried, found that the said freight rate acts and passenger fare law did not interfere with and were not direct burdens upon interstate commerce. He found, however, that said passenger and freight rates did not afford the railroads revenue suf-

ficient to provide a reasonable return on the fair valuation of the properties employed in rendering the service and were therefore confiscatory. He taxed one-half of the costs in each of the cases against the appellants and one-half of the costs in each of said cases against the appellee.

The original bill of complaint filed in these cases attacked the validity of an enactment of the General Assembly of the State, approved April 15, 1905, and in which was fixed the maximum rates for the transportation of certain commodities in *carload lots only*. Its effect as a whole was to reduce the rates for the transportation of certain commodities below those which had been previously charged by the carriers under authority of law and with the approval of the Board of Railroad and Warehouse Commissioners.

This act is found on page 330 of the Missouri Session Acts for 1905, and is the first act printed in the appendix. Under section 36 of article IV of the Constitution of Missouri this act became effective June 16, 1905, same being ninety days after the adjournment of the General Assembly.

On June 16, 1905, the date of the act took effect, the railroad companies instituted these suits. Each complainant filed its bill of complaint in the circuit court against the attorney-General of the State, the members of the Board of Railroad and Warehouse Commissioners and certain other persons alleged to be shippers. An order was at once issued in each of those cases, without notice to the defendants, restraining them from taking any steps to enforce the act or those provisions intended to secure obedience to it.

The bill in each case among other things alleged the passage of the act of 1905 and averred that it would take effect June 16, 1905, and that the rates then being charged by the complainants for the transportation of freight of the character mentioned in the act, as shown in the schedules then on file with the Railroad Commissioners and posted in com-

plainants' railroad stations, were in excess of the maximum rates fixed in said act, so that if the same were permitted to be enforced, it would require such a reduction in complainants' rates as to make imperative a change in said schedule, and that such change the complainants did not propose to make and could not make without jeopardizing its property interests.

That the Railroad Commissioners proposed and threatened to and would, unless enjoined, enforce the provisions of said act by entering upon investigations on its own instigation and upon the complaint of shippers, and by determining complainant's said schedule of rates to be unreasonable, unjust and extortionate, for the reason that they were unauthorized by the act of 1905, and by requiring the complainant, under the pain of large penalties threatened to be enforced, to file and publish a new schedule of rates not in excess of those fixed by said act of 1905. That the Railroad Commissioners proposed to file and publish, as the complainant's schedule, the maximum rates fixed by said act, if the complainant should refuse to do so, and that they proposed to direct the prosecuting attorneys in the counties through which the line of complainant's railway runs to prosecute and recover of the complainant the penalties provided by law, and to direct the Attorney-General to assist in such prosecutions, and to direct the Attorney-General to prosecute the complainant and recover the penalties provided by law for its failure to comply with the orders which the Railroad Commissioners proposed, from time to time, to make in investigations instituted for the enforcement of said act of 1905, by compelling the complainant to adopt rates in accordance therewith.

Certain shippers were also made defendants, upon the theory that they represented all shippers as a class.

The bill charged the act of 1905 to be unconstitutional and inoperative for the following reasons:

(a) Because the act prescribed unreasonable rates which, if enforced, would confiscate the property of the complainant and require it to carry the commodities therein specified, and to conduct its entire freight and other local traffic in the State for a sum which would not pay the actual operating expenses necessarily incurred in performing the service, and for that reason was violative of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto, prohibiting the taking of property without due process of law, and guaranteeing to all persons the equal protection of the laws.

(b) Because the act was discriminatory for the reason, as was averred, that while the cost of transporting live stock was greater than that of any other commodities in which a reduction was made, yet the act fixed the rate therefor much lower than that fixed by it on salt, cement, lumber, lath and shingles; and that the unequal, partial and arbitrary reduction in rates upon articles affected by said act of 1905, as compared with other commodities and between the different commodities themselves, mentioned in the act, worked an injustice between the shippers, producers and manufacturers of the State, deprived them of their property without due process of law and denied to them the equal protection of the laws, and also deprived the complainant of its property without due process of law, and denied to it the equal protection of the law, in this, that the Legislature having previously established maximum rates or charges for the transportation of all kinds of property, which were presumably fair and reasonable, did, by the act of 1905, attempt to further regulate the affairs of the complainant and require it to discriminate in favor of certain persons and shippers and give them transportation for a less rate than the general rate theretofore fixed by law, or than was just and reasonable in view of the cost to the carrier or the value of the service rendered to the shipper.

(c) Because the act provided that in computing the rate of freight the distance should be computed from the point where it was received to the point of destination in the State, notwithstanding it might pass from one road to another; that this impaired complainant's freedom of contract, and fixed for it a rate based upon carriage over the line of another road, whereby the provisions of the Federal Constitution and the amendments thereto, theretofore referred to, were violated, and the freedom of contract guaranteed by section 4 of article II of the Constitution of the State was denied.

(d) Because it attempted to adopt and create, as part of article IV of chapter 12 of the Revised Statutes of Missouri of 1899, two sections, called sections 1194a and 1194b, when the act of 1903 adopted sections so numbered as part of the same article and chapter; that there was by the act of 1905 no repeal or attempted repeal of said act of 1903; that the act of 1905 cannot be treated as amendatory to the act of 1903, because it was insufficient, for the reason that it did not, in anywise, comply with the provisions of section 34 of article IV of the Constitution of the State, which provided as follows:

> "No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full, as amended."

And that the act was therefore invalid because the law is uncertain, there being two separate enactments upon two

different subjects, designated as section 1194a and 1194b, of article IV of chapter 12 of the Revised Statutes of 1899.

(e) Because, while it provided that no individual company or corporation owning, operating, managing or leasing any railroad, or part of railroad, should demand, charge or receive, for the carriage of the commodities mentioned, higher rates than those fixed in the act, it also provided that the penalty for a violation of the act should be enforced only against railroad companies, whereby individuals were exempted from such penalties; and that this was a discrimination between individuals and companies, and denied to the complainant the equal protection of the laws guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

The bill further averred that the complainant was and for many years past had only been able to carry on its business in Missouri without bankruptcy because of its earnings from interstate business. That the rates charged by it for the transportation of property between points in Missouri were lawful, just and reasonable to the public, and had been in effect under the sanction of the Railroad Commissioners of the State; that the rates charged on all commodities transported between points in the State were not, nor had they been, for many years remunerative or afforded to the complainant a fair or reasonable return for its services upon the value of its property employed therein; that complainant's local business was carried on at an actual loss, and that if it complied with the requirements of the act, it would lose a further large sum; that the rates prescribed by the act, whether considered separately or as a whole in connection with the entire freight traffic in the State, were unjust, unreasonably low and confiscatory. That the classes of freight mentioned in the act could not be carried at the rates therein prescribed except at an actual loss.

Complaint was also made that the provision in the act, that in computing the distance upon which the maximum rates should be based, the whole distance over which a shipment was to be transported in the State should be considered, although it might be over the roads of two or more companies, was invalid because it would operate to reduce the rates upon through shipments, making them more unreasonable than in the case of a shipment between points upon a single railroad.

The bill further averred that there were many other companies operating lines of railroad in the State, each of which claimed that the rates fixed by the act of 1905 were confiscatory, and if charged, would result in the company doing its State business without any profit. And it was stated that each of the other companies had filed, or would at once file, a bill similar to that of the complainant. And it was averred that if it should be held that the rates fixed by the act were valid as against the complainant, but in point of fact were unreasonably low against each of the other companies, the act would be invalid as against the complainant, and therefor, in such case, even if held valid as to the complainant, would be unconstitutional because it would be discriminatory as not applying alike to all persons and corporations operating railroads in the State.

The bill complained particularly of the rate fixed by the act for the transportation of live stock, averring that the cost of such transportation was greater than that of other commodities, while the act fixed a rate for its transportation much lower than that prescribed for salt, cement and certain other commodities. This, it was averred, worked an injustice between the shippers, producers and manufacturers of the State, and likewise operated to deprive the complainant of its property without due process of law, and denied to it the equal protection of the laws because the Legislature,

having established maximum rates of charges for the transportation of all kinds of property, which were presumably fair and reasonable, was now attempting to further regulate the affairs of the complainant and to require it to discriminate in favor of certain persons and shippers in giving them a rate less than the general rate theretofore fixed by law.

The prayer of the bill was (1) that the act of 1905 be declared unconstitutional, unenforcible and not binding upon the complainant; (2) that the defendants be enjoined from taking any steps looking to the enforcement of the provisions of the act.

RESTRAINING ORDER.

Immediately upon the filing of the bill, a restraining order was issued in each of the cases, which was as follows:

> "The original bill of complaint having been this June 16, 1905, by the solicitors for complainant duly presented, and the court being fully advised in the premises, orders and decrees: Complainant's application for temporary injunction herein is set down for hearing at the United Staes Circuit Court room in Kansas City, Missouri, on June 26, 1905, at 10 o'clock a. m., or as soon thereafter as it is convenient for the court to hear the same.
>
> In the meantime, and until the further order of court herein, each and all of the above-named defendant railroad commissioners, their agents, servants and successors, are restrained from taking any steps to put in force the maximum rates mentioned in the act of the Legislature of the State of Missouri, approved April 15, 1905, and entitled 'An act, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Cor-

porations, private,' by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification—charges—commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof;' from requiring complainant to post maximum rates at any place, or to file same with them; from requiring a schedule thereof to be filed with them; from taking or making out, or printing, or delivering any schedule of rates for complainant containing the maximum rates fixed by said act; from instituting any investigation of any complaint that any rate is unreasonable, extortionate or unjust because higher than the maximum rate fixed by said act; from directing the attorney-general of the State, or any prosecuting attorney therein, to prosecute or assist in prosecuting complainant directly or indirectly for any failure to file a schedule adopting said maximum rates, or for any failure to recognize, adopt or comply with said act.

And in the meantime, and until the further order of court herein, the above-named Attorney-General and his assistants and successors are restrained from bringing any suit or action against complainant to enforce against it, directly or indirectly, any penalty in anywise dependent or based upon the failure of complainant to recognize or abide by the said act of the Legislature.

And in the meantime, and until the further order of court herein, the defendants, John A. Knott, Joseph P. Rice, and Frank A. Wightman, Railroad Commissioners of the State of Missouri; Herbert S. Hadley, Attorney-General of the State of Missouri; Charles M. Daily, William F. Davis and James F.

Robb, and all other shippers affected by this proceeding, are restrained from instituting any action, or taking any steps to collect any penalties for the alleged violation of said act of 1905."

PRELIMINARY INJUNCTION ISSUED.

On July 12, 1905, the causes came on for hearing upon the application of the complainants for a preliminary injunction, and after being fully argued upon the face of each bill, the objections thereto urged by the defendants being the same as subsequently formulated in their demurrers to the bills, the court ordered that the restraining order theretofore issued in each case should continue and remain in force as a temporary injunction.

DEMURRER TO BILL.

On August 7, 1905, the Attorney-General of the State, one of the defendants, filed his demurrer to each bill of complaint. At the same time the Railroad Commissioners also filed their demurrer to each bill.

Among other grounds upon which the demurrer proceeded was the fact that it did not appear from the bill of complaint in each case that charges for the transportation, between points within this State, of such article of freight, maximum rates for the transportation of which were not fixed by the act of 1905, might not or could not have been established by the complainant if it had chosen to make any effort to do so, or by the Board of Railroad Commissioners, if it had been permitted by the complainant to do so, at such rates as would have been reasonable and just, both to the complainant and to the public, observance of which and of the provisions of the act of 1905, in the transportation by complainant of its entire intrastate traffic, would, as a whole, have rendered to the complainant a fair and reasonable profit for transporting

the same. That complainant had made no effort or attempt to readjust its schedules of freight rates, as a whole, with a view of complying with the requirements of the act of 1905, nor had it afforded to the Board of Railroad Commissioners an opportunity on its part of making such effort, but, on the contrary, by filing the bill of complaint on the day said act took effect, and obtaining the restraining order before the Board of Railroad Commissioners could by any possibility have taken any action in the direction of establishing freight rate schedules for intrastate traffic, which, considered as a whole, would produce a reasonable compensation to the complainant for its services, had prevented said Board from making any such effort.

DEMURRER OVERRULED.

On October 14, 1905, the court overruled the demurrers to the bills of complaint.

On November 28, 1905, the Railroad Commissioners filed their answer in each case, and on December 1, 1905, the Attorney-General filed his answer to the bill of complaint in each of said cases.

ANSWER TO BILLS.

The answers denied the material allegations of the bill of complaint in each case and asserted the validity of the act of 1905. It averred that the complainant companies operating lines of railroad in the State, acting in concert, did, upon the day the act took effect, file their bills of complaint to enjoin the officers of the State from taking any action or discharging any duties which might be imposed upon them by law in respect of said act and for the purpose of obtaining a decree adjudging the act to be null and void upon the grounds stated in the bills of complaint; that upon the filing of the bills a restraining order was at once issued and served upon the

Attorney-General and the members of the Board of Railroad and Warehouse Commissioners, enjoining them from performing any of the duties imposed upon them as State officials, by law, looking to the enforcement of the provisions of the act.

The answer further averred, in substance, that the filing of the bill in each of said cases was premature; that the rates for carrying a large number of articles, constituting a large part of the intrastate freight traffic of the complainant, remained wholly unaffected and unregulated by the act of 1905, or any other existing statute; that the question as to whether rates are compensatory or otherwise could only be determined upon a consideration of a schedule which should embrace every article and all the freight transported by the complainant in its State business; that no effort had been made by the complainant to revise its rates upon articles of freight not affected by the act; that by the issue of the restraining order the Board of Railroad Commissioners had been prevented from attempting to revise the schedule, to the end that the rates, as a whole, upon all the intrastate freight transported by the complainant might be compensatory.

That part of the answers so filed in each case was as follows:

> "These defendants say that they are informed and believed that the rates fixed by said act of 1905 do not affect all the articles of freight transported by the complainant in its intrastate traffic, but that a very large number of articles, and a very large part of its intrastate traffic, remains wholly unaffected and unregulated, as to rates, by said act or by any other existing statute. And these defendants say that the question of whether rates are compensatory or otherwise, can only be determined upon a consideration of a schedule of rates, which shall embrace every article and all the freight trans-

ported by the complainant in carrying on its intrastate business.

These defendants are informed and believe that the complainant, if it had chosen to do so, instead of attacking the reasonableness or fairness of the rates upon the few articles mentioned in the act of 1905, might have revised its schedule of tariff of rates upon all the articles of freight transported by it in carrying on its intrastate traffic, including those mentioned in said Act of 1905, in such a manner that the rates for carrying the articles not mentioned in said act would have been not unreasonable or unjust, either of (to?) itself or to the public, and that the income derived by the complainant for performing the service of transporting freight at the rates and charges fixed in such a schedule would have been sufficient to assure to the complainant a fair and reasonable return upon the fair value of its property necessarily employed in the carrying on of such intrastate business.

These defendants further aver that the complainant afforded to these defendants, as a Board of Railroad Commissioners, no opportunity, after said act of 1905 took effect, to revise, adjust and fix a schedule of rates upon all the articles of freight transported by the complainant in its intrastate traffic, including those mentioned in said act of 1905, in such a manner that the provisions of said act of 1905 would be observed, and at the same time the rates upon all other articles not mentioned in this act, should be not unreasonable or unjust, either to the complainant or to the public.

These defendants further say that if the complainant had failed to so revise or to attempt to so

revise its schedule, these defendants, as such board, would if they had been given the opportunity which was denied to them by the injunction in this cause, in the discharge of the duties imposed on them by law, have attempted to fix and establish such a schedule of rates upon all the articles of freight transported by the complainant in its intrastate traffic as would have observed or complied with the provisions of said act of 1905, and in other respects have been not unjust or unfair either to the complainant or to the public, and they believe that they could have done so.

These defendants further say that by the issue of the restraining order, and the preliminary injunction in this cause, they have been prevented from fixing any such schedule or attempting to fix a schedule of rates which should be just to the complainant and to shippers; that the complainant, by the filing of its bill before these defendants, as such board, could lawfully act in the premises, has unwarrantably assumed that these defendants, as such board, would fix and establish a schedule of rates which would be unjust to the complainant.

These defendants say that in view of the statutes of this State, which define the duties to be discharged by them as such board, this action ought not to be maintained, because it was brought before these defendants had any opportunity to discharge any of such duties, or act in the matter of a general revision of the schedule of rates, made necessary by said act of 1905."

REFERENCE TO A MASTER.

On March 5, 1906, these cases were referred to a Master to take the evidence and report his findings of fact thereon. The order of reference provided that he should hear only such of the cases as the parties, by their counsel, should, at the beginning of the inquiry, agree should be heard.

Pursuant to this order, the Master proceeded, under an agreement of counsel, to take the evidence in three of the eighteen suits: in the one brought by the Chicago, Burlington and Quincy Railroad Company, the one brought by the Wabash Railroad Company, and the one brought by the Missouri Pacific Railway Company. A very large amount of testimony was taken before the Master, sitting at St. Louis, at Chicago and at Kansas City, in each of the three cases.

The taking of the testimony before the Master was fully completed, and the *testimony closed* in the suit brought *by* the Chicago, Burlington and Quincy Railroad Company on April 17, 1907 (Record, Vol. I, pp. 1099, 1226); in the case of the Wabash Railroad Company, on April 16th, 1907 (Record, Vol. 3, pp. 3058-9); and in the case of Missouri Pacific Railroad Company, on April 17, 1907 (Record, Vol. 3, pp. 2359-60).

The General Assembly of the State of Missouri also passed an act regarding the transportation of stone, sand and brick in carload lots, said act being approved April 14, 1905, and also became effective June 16, 1905, and fixed maximum rates for the transportation of said stone, sand and brick. This act was not referred to in any of the original bills so filed.

FREIGHT RATE ACTS OF 1907.

The General Assembly of 1907, passed three acts regarding the transportation of freight. One of them, same being the third act printed in the appendix, approved March 19,

1907, repealed the said act of April 15, 1905, attacked by the original bill of complaint, and the act of April 14, 1905, concerning the carriage of stone, sand and brick and enacted a new law in the place of said acts. This new enactment took effect June 14, 1907. It fixed maximum rates for the transportation of certain commodities *in carload lots* such rates being on the whole higher than the rates fixed by the act of 1905, attacked in the original bill in each case.

Another of the acts of the General Assembly of 1907 was approved March 19, 1907, also took effect June 14, 1907, and fixed maximum rates for the carriage of fruit *in carload lots* and which said act is the fourth act printed in the appendix.

Another of the acts passed by the General Assembly of 1907 was approved April 4, 1907, and also took effect June 14, 1907, and provided for free transportation for shippers in certain cases, and is the fifth act printed in the appendix.

PASSENGER RATE ACT OF 1907.

The General Assembly of 1907 also passed an act approved February 27, 1907, which also took effect June 14, 1907, fixing maximum rates for the transportation of passengers within the State and is known as the Missouri two-cent passenger fare law and is the last act printed in the appendix.

APPLICATION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL BILLS.

June 11, 1907, nearly two months after the taking of the testimony before the Master had been closed and the cases were awaiting argument before the Master, and three days before the freight rate acts and the passenger rate act of 1907 took effect, the complainant filed its motion for leave in each case to file an amended and supplemental bill.

This motion was opposed by the defendants upon the grounds thereafter fully set out in their demurrer to the amended and supplemental bill, and was submitted upon oral argument June 15, 1907.

ORDER GRANTING LEAVE TO FILE AMENDED AND SUPPLEMENTAL BILLS.

June 17, 1907, complainants' motion for leave to file an amended and supplemental bill in each case was sustained, and an order made giving leave to file the same as of June 11th, and it was filed.

This order also granted a temporary injunction as to the freight rate laws of 1907. The order also provided as to the passenger rate act of 1907 that the rates fixed thereby should be put in force for three months.

July 16, 1907, an "Amendment to complainants' bill of complaint" was filed in each case.

THE AMENDED AND SUPPLEMENTAL BILLS AND THE AMENDMENTS THERETO.

The amended and supplemental bill in each case, and the amendment thereto set out the enactment of the three freight rate laws and the passenger rate law of 1907. It averred that each of the freight rate laws violated the provisions of the Constitution to the same extent as was alleged of the act of 1905; that the rates fixed by the freight rate acts of 1907 were unreasonable and less than the cost of service; that although the maximum freight rates provided by the act of 1907 had been increased, they were still unreasonable, and did not afford fair compensation to the complainant.

It was also averred that the passenger act of 1907 was unconstitutional and void for the same reasons urged in

the original bill in each case against the freight rate act of 1905; that the value of that portion of the complainant's property devoted to the carriage of State business, considered as a whole or separately as to the passenger business only, was such that in either case the reduction in rates by the passenger act would cause the business to be done at an actual loss.

It was further averred that the rates fixed by each of the freight rate acts of 1907 and by the passenger act of the same year, and as a whole, are so unreasonable and confiscatory that a compliance therewith would force a confiscation in each case of the complainant's entire revenue contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

It was further averred that to enforce the rates fixed in any of said acts would necessarily affect the interstate rates upon the same commodities; and because Congress had attempted to legislate upon the subject of interstate rates, and because none of the rates fixed by the said acts complained of could be enforced without affecting interstate rates, all of said acts were unconstitutional and void and violative of section 8, article I of the Constitution of the United States.

The prayer in each of said cases was that each of the acts of 1907, including the passenger rate act, be declared unconstitutional, and that all the relief asked in the original bill, as to the act of 1905, be granted as to the acts of 1907, and that the temporary injunction granted against the defendants on the original bill might be extended so as to cover any proceedings by them under any of the acts of 1907.

The amendment to complainant's bill of complaint in each case complained that the penalties provided by the State laws were harsh and unreasonable, and that the

acts complained of directly influenced, affected and bore upon interstate passenger traffic and fixed and regulated the same.

DEMURRERS TO THE AMENDED AND SUPPLEMENTAL BILLS OF COMPLAINT AS AMENDED.

August 2, 1907, the defendants demurred to the amended and supplemental bill of complaint as amended in each case. The demurrer formulated the grounds upon which, at the oral argument in June, the motion for leave to file an amended and supplemental bill had been opposed by the defendants.

Beside the general grounds of demurrer ,it proceeded upon the grounds (1) that the matters and things set forth in the amended and supplemental bill of complaint as amended were not, nor were any of them, germane to or supplementary of the original bill in the case; and, (2) that if the complainant was entitled to any relief whatever on account of facts stated in the amended and supplemental bill of complaint, such facts constituted a new, original and independent cause of action not connected with or dependent upon the cause of action set forth in the original bill.

INTERLOCUTORY REPORT OF THE MASTER.

September 24, 1907, the Special Master filed his interlocutory report, stating that the evidence had been taken in three cases, and that June 18, 1907, had been fixed as the day for the argument thereon before the Master; but that the complainants, having just prior to that date filed amended and supplemental bills, further proceedings before the Master were, by consent of parties, suspended, and the Master prayed for further directions. (Record, Vol. 1, pp. 93-4.)

Upon this report the court made an order that all the matters involved in the original bills and the amendments should be fully heard and the findings embraced in a single report. (Record, Vol. 1, p. 94.)

DEMURRERS TO AMENDED AND SUPPLEMENTAL BILLS OVERRULED.

April 10, 1908, the demurrers to the amended and supplemental bill of complaint as amended were overruled.

THE ANSWER TO THE AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT AS AMENDED IN EACH CASE.

May 12, 1908, the defendants filed their answer to the supplemental bill and the amendment thereto in each case. The answer admitted the enactment of the laws of 1907, both freight and passenger, as set out in the amended bill.

It denied that any of the freight acts were violative of the provisions of the Constitution, or that the rates fixed by them were unreasonable or confiscatory. It denied the existence of the purposes and motives of the Legislature of the State, as attributed to them by the amended and supplemental bill.

It denied that the act regulating passenger rates was violative in any respect of any provision of the Constitution of the State or of the United States, or that the act would reduce the earnings of the complainant from its passenger business in any amount whatever. It disclaimed any knowledge, information or belief as to the amount of State passenger earnings for the year 1906, and denied that if the passenger act had been applied thereto, the State earnings would have been reduced in any amount whatever.

It denied that the reduction in rates by the passenger act would fail to make a reasonable return on the valuation of that portion of complainant's property devoted to the carriage of State business considered as a whole or separately as to passenger business only, and denied that such reduction would cause such business to be done at a loss. It denied that the passenger act was passed for the avowed purpose of reducing the passenger rates, so as to offset the increase of freight rates made by the act of 1907.

The answer denied that to enforce the rates fixed by any of the acts of 1907 would necessarily affect interstate rates on the same commodities; and it averred that for many years the complainant had voluntarily carried passengers in the State, whose travel was wholly within the State, at the rate of two cents a mile, and that it had carried many persons without exacting any compensation whatever, and that the great bulk of passenger transportation within the State had been for many years conducted at approximately two cents a mile; and that the charge of three cents exacted by complainant of any persons was an unjust, excessive and discriminatory charge upon such persons.

The answer further averred in substance that the matters and things alleged in the amended and supplemental bill were not proper subjects of inquiry in each of said suits, and that any controversy as to the validity of the acts of 1907 could not be determined in any of said actions.

That averment was as follows:

> "Referring to subdivision (b) of paragraph 11 of complainant's amended and supplemental bill, this defendant says that the real purpose of the

original bill herein was to determine whether that portion of the property of complainant devoted to State freight business could, if the Act of 1905 were enforced, receive such return upon its value as would be fair, reasonable and not confiscatory, and that upon the trial of the three cases heard by the Special Master such was the theory adopted by both parties, and the proofs were by both of them directed to that end. And this defendant avers that the only legitimate and proper inquiry in this suit is as to the questions of law and fact arising upon the issues made by the original bill and the answer thereto, as to the validity of the said Act of 1905, and the results of its operation, and whether the same, if enforced, would be confiscatory and unremunerative to the complainant. Defendant asserts that the purpose of the original bill ought not to be, and cannot, without disregard of the established rule of procedure of the court of chancery, be changed and perverted, to the end that the effect of the freight rate act, or the passenger rate Act of 1907, shall be considered in this litigation, and that the only question proper to be considered or determined by this court in this action is the consequences to the complainant of the enforcement of the said Act of 1905."

The answer further denied that any of the acts of 1907, if enforced, would deprive complainant of its property without due process of law, or that they denied to the complainant the equal protection of the law; but it averred that each of said acts was a reasonable and proper regulation of rates, and that they prescribed fair, proper and remunerative rates for the service. It denied that any of the acts influenced,

affected or bore upon interstate freight or passenger traffic, or that they fixed or regulated interstate freight or passenger traffic.

ORDER FIXING DATE FOR FINAL HEARING.

No testimony was taken before the Master after the filing of the amended and supplemental bill. But on January 13, 1908, the court made an order: (1) that the Special Master should file in court all of the testimony taken before him; (2) the final hearing of the cause was fixed for October 5, 1908, upon the testimony already taken, and upon such further oral and documentary testimony as might be offered in open court at the hearing. (Record, Vol. 1, p. 114.)

Afterward the date for final hearing was postponed to November 9, 1908. (Record, Vol. 1, p. 117.)

The hearing was continued from day to day, much oral and documentary evidence being produced, until December 30, 1908, when it was concluded.

These cases were each submitted to the court *upon all the evidence taken before the Master and in open court;* the testimony taken *in each of the cases* being regarded as *having been offered in each any every one of the other cases.* (Record, Vol. 1, pp. 169-171.)

FINAL DECREES.

March 8, 1909, the cause having theretofore been argued and taken under advisement, the court rendered its final decrees in said cases.

Motions were afterwards filed by the complainant to amend the decrees. (Record, Vol. 5, pp. 5244-6.)

AMENDED FINAL DECREES.

April 17, 1909, the court amended the decree in each case and adjudged and decreed:

1. That the maximum freight rate laws of Missouri of 1905 and 1907, and the passenger rate law of 1907, were unreasonable and confiscatory, and did not afford the complainant any fair or reasonable return upon the value of its property, and to comply therewith would take its property without due process of law.

2. The Attorney-General and the Railroad Commissioners were enjoined from enforcing, or attempting, directly or indirectly, by suit or otherwise, to enforce against the complainant, its officers or agents, any of the provisions of or the penalties provided for in said freight rate laws or in said passenger rate law.

3. The costs were equally divided; one-half to be paid by the complainant and one-half by the defendants.

FINDING OF FACTS.

The court, upon entering its original decree, filed an opinion. It also made certain findings of fact. (Record, Vol. 5, pp. 5305-5327.)

QUESTIONS INVOLVED IN THESE APPEALS.

The complainant contended:

First: That the rates fixed for the transportation of freight by the maximum freight rate laws of 1905 and 1907 were so low that if it complied with them its compensation for the service of transportation would be insufficient to pay the operating expenses incident to that service and afford a fair and reasonable return upon the value of that part of its property employed in the service.

Second: That the passenger rate law of 1907 fixed the maximum rate at so low a figure that complying with it the compensation of the complainant for the carriage of passengers would be insufficient to meet the operating expenses incident to that service and provide a fair and reasonable return upon the value of that part of complainant's property employed in the service.

Third: That any reduction of interstate rates for the transportation of either freight or passengers, operated to reduce interstate rates for the same class of service, and that this fact should be considered in the determination of the validity of any law making such reduction.

Fourth: That if any one of the laws in question was invalid as to one of the eighteen railroad corporations who instituted suits, it was invalid as to all of them.

Fifth: That the expenses of doing intrastate business, whether freight or passenger, should be ascertained *upon a revenue basis;* that is to say, that the gross revenue realized from either class of business should be taken as the basis from which the expense of doing that class of business was to be ascertained.

Sixth: That the acts of the General Assembly of Missouri were void, because the penalties provided by them were enormous, unreasonable and severe.

Seventh: That the maximum freight rate act of April 15, 1905, was void, because it provided that the rates fixed thereby were to be charged by any individual or railway company owning, operating, managing or leasing a railroad, while the penalties provided thereby for the violation thereof applied only to railroad corporations.

Eighth: That the complainant was entitled to a return upon the value of its franchise.

The defendants disputed each of these contentions.

IN ADDITION, THE DEFENDANTS CONTENDED:

First: That the action was prematurely brought; that the commencement of the suit on the day the maximum freight rate act of 1905 took effect, and the restraining order issued on that day and ever since continued in force, prevented the Board of Railroad Commissioners from making any effort to exercise their powers in revising rates for the transportation of a large quantity of freight not within the purview of said act, which revision might, for anything that appears in this case, have resulted in a schedule of lawful rates which, in connection with the rates prescribed by the act of 1905, would have afforded to the complainant a compensation for the service of transportation adepuate to meet the expenses incident to such transportaion, and afford to it a fair return upon the value of the property employed in that service.

Second: That the court should not have permitted the amended and supplemental bill of complaint and the amendment thereto to be filed, because said amended and supplemental bill and the amendment thereto dealt with matters not germane to the original suit; that is to say, the freight rate acts of 1907 and the passenger rate acts of 1907, and that therefore the court had no jurisdiction to declare any of said acts unconstitutional or void for any reason whatever.

THE APPEALS.

The defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, members of the Board of Railroad Commissioners, and Elliott W. Major, the Attorney-General, obtaining an order of severance from their co-defendants, were allowed an appeal from the decree in each case.

With their petition for an appeal they also filed an assignment of errors.

The complainant was also allowed a cross-appeal in each case, and filed its assignment of errors at the time, its complaint being that the court had adjudged against the complainant one-half the costs.

A mass of testimony to support the contention of the opposing parties was taken and appears in the record, but as much of it will necessarily be quoted and referred to more profitably in the printed argument to follow this abstract of the case, a statement of it at this point would cause useless repetition.

SPECIFICATION OF ERRORS.

The appellants specify the errors complained of by them in each case, as follows:

> "1. The court erred in adjudging and decreeing, by its amended decree, that the maximum freight rate laws of Missouri of 1905 and 1907 are unreasonable and confiscatory and do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence shows that said laws are reasonable and compensatory, and that they do afford the complainant a fair and reasonable return upon the value of its property; and upon the evidence in the case, the complainant's bill and its amended and supplemental bill, in so far as they sought for any relief against, or brought into question the validity of said maximum freight rate laws, should have been dismissed.
>
> 2. The court erred in its amended decree in thereby adjudging and decreeing that the defend-

ant, Elliott W. Major, Attorney-General of the State of Missouri, be enjoined from enforcing or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employes or servants, any of the provisions of or penalties provided for in the acts of the Legislature of the State of Missouri, mentioned in said decree, and approved, respectively, April 14, 1905, April 15, 1905, and two approved March 19, 1907.

3. The court erred in its amended decree in thereby adjudging and decreeing that the defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad Commissioners of the State of Missouri, be enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employes or servants, any of the provisions of or penalties provided for in the acts of the Legislature of the State of Missouri, mentioned in said decree, and approved, respectively, April 14, 1905, April 15, 1905, and two approved March 19, 1907.

4. The court erred in decreeing that the maximum freight rate laws of 1905 and 1907 are unreasonable and confiscatory, do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence in the case is not sufficient to overcome the presumption in favor of the validity of those laws, and the evidence does not establish clearly and beyond all doubt their invalidity.

5. The court erred in decreeing that the freight rate laws of 1905 and 1907 were confiscatory and therefore deprived the complainant of its property without due process of law, because the burden of proof upon that issue was upon the complainant, and that burden was not sustained. The exact gross revenue from intrastate business for any given period was easy of ascertainment. The ascertainment of the expense of earning that revenue was difficult by reason of the fact that interstate and intrastate freight were transported in the same trains and often in the same cars. It was in the power of the complainant, at any time during the litigation, to have determined, by actual observation and investigation for a period which should be typical, the volume of freight, both interstate and intrastate, carried on each of its trains within the State of Missouri during such period, the revenue from each class of freight, and also, quite closely, the expense of moving each of said trains within the State, and to have exhibited to the court the result of such observation and investigation. The court would thus have been enabled to determine approximately how much of the total expense of moving said trains should be assigned to the intrastate and interstate freight, respectively, contained in them.

No evidence of this character was adduced, no tests of this kind made. Upon this question the court was left to reach a conclusion upon the opinions of witnesses. No decree should have been rendered for complainant until this evidence of actual facts of vital importance, which was at its command, had been adduced to the court.

6. The court erred in adjudging and decreeing in its amended final decree herein that the maximum freight rate laws of Missouri, of 1905 and 1907, were unreasonable and confiscatory, and did not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; and that none of the provisions thereof should or can be rightfully enforced against the complainant, its officers, agents or employes:

Because it appears from the evidence that a very large part of the intrastate freight transported by the complainant is not governed as to the rates to be charged therefor by the Acts of 1905 and the Acts of 1907, but that the maximum rates for the transportation thereof are fixed by the State Board of Railroad and Warehouse Commissioners, by authority of law, conferring upon them that power. It further appears from the evidence, that the complainant has not been charging for the transportation of such freight the rates so fixed by the State Board of Railroad and Warehouse Commissioners, but rates less than those so fixed. But the complainant failed to show and made no effort to show what its revenue from the intrastate freight business would have been had it charged the rates allowed by the State Board of Railroad and Warehouse Commissioners for such portion of the freight carried by it as was not governed by the Acts of 1905 and 1907; and therefore there is no evidence in the case that if the complainant had charged such rates, and had also complied with the Acts of 1905 and 1907, it would not have received a revenue from its intra-

state freight business which would have afforded it a fair, adequate and just return for doing such business. If it had charged what it might, according to the law of the State, have charged for the transportation of such freight, its receipts for doing its entire intrastate freight business might, for any evidence which appears in the case, have been sufficient to afford it all the net profit to which it was entitled.

7. The court erred in adjudging and decreeing in the amended final decree that the maximum freight rate laws of Missouri of 1905 and 1907 are unreasonable and confiscatory, and do not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainants without due process of law, because the said Acts of 1905 took effect on the 16th day of June, 1905, and the original bill herein, alleging the unconstitutionality of said Acts of 1905, and seeking to enjoin their enforcement was filed by the complainant on said 16th day of June, 1905, and on the same day a restraining order was issued herein, enjoining the defendants, the Railroad and Warehouse Commissioners, "from taking or making out or printing or delivering any schedule of rates for complainant, containing the maximum rates fixed by said acts." And on the 12th day of July, 1905, the court continued said restraining order as a temporary injunction, which was in force as against said defendants from said date until the final decree was entered. Therefore, at the time of the filing of said bill and the issue of said restraining order, the defendants, said Railroad and Warehouse Commissioners, be-

cause the law had not yet taken effect, had enjoyed no opportunity to revise the then existing schedule of rates.

The said defendants, Railroad and Warehouse Commissioners, had authority, under the law, to fix maximum rates for the transportation of that portion of the intrastate freight for which rates were not fixed by the Acts of 1905, which said portion was very large in volume and produced to the complainant much the larger part of its entire revenue for the transportation of intrastate freight. The said Railroad and Warehouse Commissioners might, if they had not been prevented by the restraining order and temporary injunction herein, have fixed such rates for the transportation of said portion of such intrastate freight, and made schedules therefor, which schedules should also have embraced the maximum rates for the commodities mentioned in the said Acts of 1905, as would have permitted the complainant, while observing said schedules and said Acts of 1905, to have derived from its intrastate freight business, as a whole, a gross revenue sufficient to have yielded to it a fair, just and adequate net return or profit from the doing of its said intrastate freight business. The complainant should have deferred the institution of this suit until said Board of Railroad and Warehouse Commissioners had fixed rates and adopted schedules so low as to disable the complainants from realizing an adequate revenue upon its entire intrastate freight business.

Therefore, the action was prematurely brought; and for this reason no restraining order or tempo-

rary injunction or final decree should have been rendered as to either of said maximum freight rate acts.

8. The court erred in adjudging and decreeing by its amended final decree that the passenger rate law of 1907, approved February 27, 1907, is unreasonable and confiscatory, and does not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because, upon the evidence in the case, said passenger rate law is reasonable and compensatory, and does afford the complainant a fair and reasonable return upon the value of its property; and upon the evidence in the case, the complainant's bill, and its amended and supplemental bills, in so far as they sought for any relief against or brought into question the validity of said passenger rate law of 1907, should have been dismissed.

9. The court erred in decreeing that the passenger rate law of 1907 is unreasonable and confiscatory, does not afford the complainant any fair or reasonable return upon the value of its property, and that to comply therewith would take the property of complainant without due process of law; because the evidence in the case is not sufficient to overcome the presumption in favor of the validity of the law, and the evidence does not establish clearly and beyond all doubt its invalidity.

10. The court erred in its amended decree in thereby adjudging and decreeing that the defendant, Elliott W. Major, Attorney-General of the State of Missouri, be enjoined from enforcing or attempt-

ing, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainant, its officers, agents, employes or servants, any of the provisions of or penalties provided for in said Act of the Legislature of the State of Missouri, mentioned in said decree and approved February 27, 1907.

11. The court erred in its amended decree in thereby adjudging and decreeing that the defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad Commissioners of the State of Missouri, be enjoined from enforcing, or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce against the complainants, its officers, agents, employes or servants, any of the provisions of or penalties provided for in said Act of the Legislature of the State of Missouri, mentioned in said decree and approved February 27, 1907.

12. The defendants, John A. Knott, H. R. Oglesby and Frank A. Wightman, Railroad and Warehouse Commissioners, for themselves assert that the court erred in that part of its decree whereby it enjoined them from enforcing, or attempting, directly or indirectly, to enforce against the complainants, its officers, agents, employes or servants, any of the provisions of or the penalties provided for in the passenger rate act, approved February 27, 1907; because, under the laws of the State of Missouri, they have no functions of any kind to perform in relation to rates for the carriage of passengers, nor do such laws vest in them any authority, or devolve upon them any duties to be performed by them, directly or indirectly, to re-

quire or compel obedience to any laws relating to rates for the carriage of passengers.

13. The court erred in permitting the complainant, against the objection of the defendants, to file herein its alleged amended and supplemental bill of complaint, and the amendment thereto, because the original bill was based upon the Acts of the 43rd General Assembly of the State of Missouri, approved April 14, 1905, and April 15th, 1905, which fixed maximum rates for intrastate freight, and the alleged amended and supplemental bill and the amendment thereto is based upon the Acts of the 44th General Assembly of the State of Missouri, approved March 19, 1907, which repealed said Acts of 1905 and established a new maximum of rates for intrastate freight, and the Act of the 44th General Assembly of the State of Missouri, approved March 19, 1907, fixing rates for the transportation of fruit, and the Act of the 44th General Assembly of the State of Missouri, approved February 27, 1907, fixing a maximum schedule of rates for passenger traffic, and the matters set forth in the said alleged amended and supplemental bill of complaint, and the amendment thereto, are not germane to or supplemental of the original bill of complaint herein.

14. The court erred in permitting the complainant, against the objection of defendants, to file the alleged amended and supplemental bill of complaint and the amendment thereto, so far as the same relates to the Act of the 44th General Assembly of the State of Missouri, approved February 27, 1907, fixing a maximum schedule of passenger rates, because the matters set forth in said alleged

amended and supplemental bill, and the amendment thereto, relative to said Act of the 44th General Assembly of the State of Missouri, fixing a maximum schedule of passenger rates, are not germane to or supplemental of any of the matters alleged in the original bill.

15. The court erred in overruling the demurrer of the defendants to the alleged amended and supplemental bill of complaint and the amendment thereto, because the matters contained in said alleged amended and supplemental bill of complaint and the amendment thereto are not germane to or supplemental of the original bill, and if they constitute any cause of action whatever, constitute a new, original and independent cause of action not connected with or dependent upon the original cause of action, and one that accrued, if at all, long after the original bill was filed.

16. The court erred in overruling the demurrer of defendants to the portions and paragraphs of the alleged amended and supplemental bill of complaint and the amendments thereto, relative to the Act of the 44th General Assembly of the State of Missouri, fixing a maximum schedule of passenger rates, because such portions and paragraphs of the alleged amended and supplemental bill of complaint, and the amendment thereto, are not germane to or supplemental of the original bill of complaint, and constitute, if anything, a new and independent cause of action not connected with or dependent upon the original cause of action, and one that accrued, if at all, long after the original bill was filed.

17. The court erred in granting to the complainant the relief asked, with respect to the Act of the 44th General Assembly of the State of Missouri, fixing a maximum schedule of passenger rates, because it was not authorized to take jurisdiction of that matter upon a bill of complaint filed as an amendment or supplement of a bill based upon acts of the 43rd General Assembly of the State of Missouri, which were confined to freight rates and had been repealed.

18. The court erred in enjoining the defendant, Elliott W. Major, Attorney-General of the State of Missouri, from prosecuting the suits for injunctive relief, instituted by his predecessor in office, Herbert S. Hadley, in the State court of Missouri, against the complainant prior to the filing of the alleged amended and supplemental bill of complaint herein.

19. The court erred in finding that the expense of doing the intrastate business over the interstate is greater for carrying freight by at least fifty per cent. By this language in the finding is meant at least fifty per cent. more in proportion to revenue, while upon the weight of credible evidence in the case, the expense of doing the intrastate freight business over the interstate is not greater than thirty per cent. per ton per mile.

20. The court erred in finding that the evidence shows that the cost of doing the intrastate freight business, as between intrastate and interstate, apportioned upon the revenue basis with added extra cost, brings a result which is fair, representative and just.

21. The court erred in finding that, aside from the revenue basis, the evidence shows that the amount ascertained by the court in any of the cases, as the expense and extra cost of doing the intrastate freight business, is fair or justly represents the expense of doing the intrastate freight business.

The appellants assert, on the contrary, that aside from the revenue basis, there is no evidence in the case from which the result as found by the court as to the expense of doing the intrastate freight business can be reached.

22. The court erred in finding that the proper method of dividing the total expense of doing complainant's freight business in the State and assigning the proper proportion thereof to the intrastate freight business was by the application of the revenue theory and in accordance with that theory dividing the total expense between the two classes of business in proportion to the revenue derived from each, and then, to the portion thus assigned to the intrastate freight business, adding such an amount as would represent fifty per cent. greater expense in proportion to revenue for the intrastate than for the interstate business. The consequence was to burden the intrastate freight business with a portion of the total expense very largely in excess of its just proportion and a much greater share thereof than was actually incurred in doing that business.

The court should have found that the proper method of ascertaining that part of the total State freight expense justly assignable to the intrastate freight was by determining, as closely as possible, the average cost per ton mile of handling and trans-

porting intrastate and interstate freight, respectively. The average cost per ton per mile deducted from the average revenue per ton per mile (which is easily ascertainable from the evidence) would have produced the net revenue per ton per mile derived from each class of freight. The court erred in its finding which rejected this method by the application of which the evidence in the case shows that complainant might have complied with the freight rate Acts of 1905 and 1907, and would still have derived from the doing of its intrastate business an adequate profit fully equivalent to any net return to which it is by law entitled.

23. The court erred in finding that the sum total of the extra cost of doing the intrastate freight business would not be changed if ascertained according to the ton mile theory.

On the contrary, the evidence shows clearly that if the expense of doing the intrastate freight business be ascertained by the application of the ton mile theory, that expense would be found to be very much less than the amount found by the court; so much less as to leave to the complainant a reasonable net return for doing the business.

24. The court erred in finding that the revenue basis is the proper method of ascertaining the expense of the intrastate passenger traffic. In pting that method the court divided the total expense of the passenger business done in the State between the intrastate and the interstate business, by assigning to each class such a proportion of such total expense as the revenue from each class of business bore to the total revenue from the State passenger traffic, and then adding to the proportion

thus ascertained for the intrastate such an amount as would represent twenty-five per cent. greater expense in proportion to revenue for the intrastate than for the interstate business. The result of the application of this method was to charge the intrastate business with a much larger share of the total expense than was actually incurred in doing that business.

The true method is to ascertain the average revenue and expense of carrying a passenger one mile, in each class of business, and the difference would be the net revenue or deficit on each passenger mile.

The evidence shows that the net revenue per passenger mile is greater in the intrastate than in the interstate business, and that the net revenue from its intrastate passenger business, if charged for at the rates fixed by the Act of February 27, 1907, affords to the complainant a reasonable and adequate return for doing the business.

25. The court erred in finding that the expense of doing the State passenger business over the interstate is at least twenty-five per cent.; this language meaning twenty-five per cent. more in proportion to revenue. The evidence in the case does not support this finding.

26. The court erred in adopting the tables of earnings and expenses of the complainant set forth in the finding of facts, because the said tables of expenses and of earnings did not cover any fairly representative period of operations of the complainant, and because said tables of expenses and earnings are not supported by any competent evidence in the case.

27. The court erred in finding that the short line between two competitive points necessarily fixes the rate. If the rate is thus fixed, it is because the complainant and the other railroad companies of the State have agreed with each other that it shall be so fixed.

28. The court erred in finding that it was conceded by the experts that the companies accurately and honestly kept their books, showing the facts set out in the findings of the court. The books of the companies did not show the facts set out in said findings, nor did the experts for the State concede that they did.

29. The court erred in finding (as stated in the opinion) that evidence in the case tended to show that a large number of men have been discharged from the service of the railroad companies by reason of the reduction of the rates. Not a reduction in rates, but a general depression in business and the want of business to keep the men employed was the cause of their discharge.

30. The court erred in finding that the value of the complainant's franchise, included in the total valuation of its property as fixed by the State Board of Equalization, was so small a per cent. of such total valuation as to make no appreciable difference in the result of the case.

On the contrary, the evidence shows that the value of the franchise was a substantial part of such total valuation.

31. The court erred in finding that if the value of complainant's franchise were altogether omitted from the value of its property, it could not have from the doing of the intrastate freight business,

obtained from the operation of its property, or the return to which it is entitled.

32. The court erred in finding that the complainant was entitled to a return upon the value of its franchise."

In this brief we will first present the views of the appellants in support of the finding and decision of Judge McPherson, that said freight and passenger rate laws do not interfere with and are not direct and substantial burdens upon interstate commerce; and, second, to present the reasons why said freight and passenger rates are not confiscatory and to emphasize the fact that the complainants have in each case wholly failed to make the proof required by law and meet the burden resting upon them. It might be well to remark here that the complainants offered no evidence whatever that said rates would interfere with interstate rates.

PART I.

THE FREIGHT AND PASSENGER RATES INVOLVED ARE NOT VIOLATIVE OF SECTION 8, ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES (COMMERCE CLAUSE).

BRIEF AND ARGUMENT.

I.

THE TWO-CENT PASSENGER FARE ACT AND MAXIMUM FREIGHT RATE ACTS INVOLVED DO NOT INTERFERE WITH NOR CONSTITUTE A DIRECT AND SUBSTANTIAL BURDEN UPON INTERSTATE COMMERCE AND ARE NOT VIOLATIVE OF SECTION 8, ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

OURS IS A DUAL FORM OF GOVERNMENT. EACH STATE HAS THE SOLE AND EXCLUSIVE AUTHORITY TO PRESCRIBE REASONABLE MAXIMUM PASSENGER AND FREIGHT RATES ON TRAFFIC WHOLLY WITHIN THE STATE. IT IS A LEGAL IMPOSSIBILITY FOR STATE RATES ON INTRASTATE TRAFFIC TO CHANGE INTERSTATE RATES. IF, HOWEVER, IT WERE LEGALLY POSSIBLE FOR STATE RATES TO CHANGE OR INTERFERE WITH INTERSTATE RATES, IT IS NO OBJECTION TO THE VALIDITY OF SUCH LAWS THAT SUCH RATES INCIDENTALLY AFFECT INTERSTATE COMMERCE.

THE MERE RAISING OR LOWERING OF MAXIMUM PASSENGER OR FREIGHT RATES BY A STATE ON INTRASTATE COMMERCE CANNOT, AS A MATTER OF LAW, CHANGE INTERSTATE RATES. IT IS A LEGAL IMPOSSIBILITY. INTRASTATE AND INTERSTATE COMMERCE CONSTITUTE TWO SEPARATE, DISTINCT AND INDEPENDENT CLASSES, AND THE RATES OF EACH ARE FIXED AND CONTROLLED

BY SEPARATE SOVEREIGNTIES. THE CHANGE IN THE RATES OF ONE BY THE STATE AND IN THE OTHER BY FEDERAL AUTHORITY ONLY OPERATES UPON AND AFFECTS ITS OWN SEPARATE, DISTINCT AND INDEPENDENT CLASS OF COMMERCE.

THE ENFORCEMENT OF THE PASSENGER AND FREIGHT RATE ACTS IN QUESTION WOULD NOT, IN FACT, HAVE THE EFFECT OF DIRECTLY AND SUBSTANTIALLY BURDENING INTERSTATE COMMERCE.

THE LAW PRESUMES THE MISSOURI ACTS ARE VALID, AND THAT INCLUDES THE PRESUMPTION THEY DO NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

A.

OURS IS A DUAL FORM OF GOVERNMENT.

The government of this country is conducted through two separate governmental functions or sovereignties, to wit, first, that of the Federal Government operating through the powers expressly given to it in the Constitution of the United States, including such other incidental powers as are necessary to carry into effect the powers granted; and second, that of the states operating by and through all the remaining powers and which are not granted to the Federal Government, nor as a matter incident to the effective exercise of such granted powers. Thus, we have two governmental powers operating at the same time, in the same state, on the same persons and property, and each sovereign within its jurisdiction. The Constitution of the United States and the enactments of Congress thereunder are supreme in the federal jurisdiction, and a state law affecting a federal subject is void; on the other hand, a federal law is void if it is made to apply to a subject or a right belonging to the jurisdiction of a state.

Howard v. Illinois Central R. R. Co., 207 U. S. 463.
Sands v. Manistee River Imp. Co., 123 U. S. l. c. 295.

This Honorable Court from the beginning has averted peril by keeping both the State government and the general government within their respective domains, and has thereby secured the harmonious operation of both. To uphold the integrity of the sovereign states, and at the same time preserve the rights and powers conferred by the Constitution upon the Federal Government. The general government has no more right to encroach upon the powers reserved in the states and not delegated to the Federal Government nor going as a matter incidental thereto, than the states have to invade those delegated to and resting in the Federal Government. (Sands v. Manistee River Imp. Co., 123 U. S. l. c. 295.) Both must be faithfully and consistently preserved and upheld to the end that good may come to both governments and the perpetuity of our institutions be guaranteed.

To break down the rights, powers and functions of the states is as dangerous in the end as to permit the states to ignore lines and invade the jurisdiction of the general government. This Honorable Court aptly expressed itself along these lines in the case of Baltimore & Ohio Railroad Company v. Maryland, 88 U. S. l. c. 485, in the following language:

> "We are bound to sustain the constitutional powers and prerogatives of the states, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences."

This Honorable Court, to whom comes for final arbitrament all these vital questions, has throughout the years,

held steadfast to this principle and has preserved the powers of each of the two governments and has, in perfect harmony, driven them in tandem.

When the Constitution of the United States was written the commerce of the nation floated upon the bosom of her rivers, her harbors and the seas. When the Constitution was adopted the power of Congress to regulate commerce was applied principally to that commerce carried on by water traffic. This court in the case of Baltimore & Ohio Railroad Company v. Maryland, 88 U. S. l. c. 470, said:

> "No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its languages and its spirit embrace commerce by land as well."

The court also said in the same case on the same page, that:

> "Commerce on land between the different states is so strikingly dissimilar in many respects from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal Governments."

And in the same case on the same page, the court also said:

> "So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land. This, when the Constitution was adopted was entirely performed on common roads, and in vehicles drawn by animal power. No one at that day imagined that the roads

> and bridges of the country were not entirely subject both as to their construction, repair and maintenance to State regulation and control. They were all made either by the State or under its authority. The power of the State to impose or authorize such tolls, as it saw fit, was unquestioned.
>
> "No one then supposed that the wagons of the country, which were the vehicles of this commerce or the horses by which they were drawn, were subject to national regulation."

As was stated in this case by the court, the movement of persons and merchandise so long as it is free to one person as another, so long at it is free to the citizens of other states as to the citizens of the state in which it is performed, is not regarded as unconstitutionally restricted by tolls exacted on the bridges and turnpikes, no matter whether they belonged to the State or to private citizens. So when the intrastate commerce found its way through the canals of the states, no amount of tolls which were exacted by the states or the companies owning them was ever regarded as an infringement of the *commerce clause* of the Federal Constitution. The court in the case of Railroad Company v. Maryland, supra, said further that after the discoveries of mechanical science had brought to the nation rapid transit through the railroads, it was not imagined nor contended that the states might not exact any amount whatever of tolls or fares on freight, or authorize its citizens or corporations if owners so to do, and in so doing they would not impinge upon the *commerce clause* of the Federal Constitution.

One of the methods resorted to for the construction of constitutional provisions is to ascertain the then existing evils. When the commerce clause of the Constitution was

adopted, New York and other seacoast states placed *burdens* on commerce from inland points to seasoast points and across such states for shipment by water. It was *burdens* on commerce that the inland localities complained of, and that such *burdens* should not be imposed was the reason for the adoption of the *commerce clause*. If there had been no such *burdens* there would have been no *commerce clause* in the Constitution of the United States. After the adoption of the Constitution as the interstate and intrastate traffic upon land was carried on and conducted by wagon trains and by coaches, there was no trouble nor question raised as to the undoubted right of a state to name the tolls or rates to be charged in intrastate traffic on the one hand, providing, of course, they were not confiscatory, and the right of the Federal Government as to its absolute control over interstate commerce on the other.

As the country grew and as American inventive genius transferred the commerce of the nation from the coach and the wagon, and from the waterways to a great system of railroads, it was not necessary to evolve any new legal principles to meet the conditions, but it was sufficient, to simply apply the constitutional provisions and well established principles of law to meet the new conditions. The courts cannot pare the rights of the states on the one hand nor add to the jurisdiction of the Federal Government upon the other. The march of time has not changed the shore line that divides the prerogatives of the Federal Government from those of the states. Nothing has been lost by erosion, nothing has been gained by accretion.

As was said by this Honorable Court in the case of in re Debbs, 158 U. S. 564:

> "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary

> with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon and on water by canal boat and sailing vessel, yet, in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and steamship. Just so is it with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new mode of such commerce which the future may develop."

In the final analysis, then, we have two sovereign powers constantly in operation in each state, the powers of each being distinct and the two together constituting a complete government. The Federal Government exercises generally the powers which affect the people of all the states alike (Cardwell v. Bridge Co., 113 U. S. 210), while the states exercise the powers that are local or domestic in their application, and the extent of the jurisdiction of these two separate sovereignties was firmly fixed by the people in the adoption of the Constitution of the United States.

B.

EACH STATE HAS THE SOLE AND EXCLUSIVE AUTHORITY TO PRESCRIBE REASONABLE MAXIMUM PASSENGER AND FREIGHT RATES ON TRAFFIC WHOLLY WITHIN THE STATE. IT IS A LEGAL IMPOSSIBILITY FOR STATE RATES ON INTRASTATE TRAFFIC TO CHANGE INTERSTATE RATES. IF, HOWEVER, IT WERE LEGALLY POSSIBLE FOR STATE RATES TO CHANGE OR INTERFERE WITH INTERSTATE RATES, IT IS NO OBJECTION TO THE VALIDITY OF SUCH LAWS THAT SUCH RATES INCIDENTALLY AFFECT INTERSTATE COMMERCE.

Commerce is by virtue of the provisions of the Constitution of the United States divided into two principal classes, to wit, interstate and intrastate, or in other words, commerce among the states and commerce wholly within the states.

The exclusive power to exercise control over and to regulate interstate commerce is unquestionably and completely lodged in the National Government by virtue of the constitutional grant of power. On the other hand, the states exercise control just as absolutely and completely over intrastate commerce (123 U. S. l. c. 295), same being the commerce wholly within the states, and do so by virtue of their reversal and inherent police power.

Congress has no power of regulation nor control over the internal commerce and trade of a state. The Federal Government cannot fix or regulate the rates on commerce wholly within the State, neither can the State fix or regulate the rates on interstate commerce. The action of Congress in the one instance and the action of the Legislature of a state in the

other instance would be invalid. The power and authority of each sovereignty is exclusive within its jurisdiction and has been repeatedly held so by this court. The Federal Employers' Liability Law was held void because it applied to employes of railroads while engaged in intrastate commerce, that being a subject over which the Federal Government had no jurisdiction. (Howard v. Illinois Central Railroad Co., 207 U. S. 463.)

In the case of Covington Bridge Co. v. Kentucky, 154 U. S. 204, the Supreme Court of the United States held that the power of the state is exclusive over that branch of commerce within its juridiction, and the power of the Federal Government exclusive over interstate commerce.

That if the states in fixing rates and tolls for passenger and freight traffic wholly within the State, fix rates that incidentally or indirectly affect interstate commerce, it would be no objection to the validity of the State legislation.

In support of these principles we present to this Honorable Court various extracts from its opinions. In the case of the Covington & Cincinnati Bridge Co. v. Commonwealth of Kentucky, 154 U. S. l. c. 209, the court said:

> "The adjudication of this court, with respect to powers of the State over the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the State may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all.
>
> "The first class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the states, and while the regulation of the State

may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power, the states may authorize the construction of highways, turnpikes, railways and canals between points in the same state and regulate the tolls for the use of same."

In the same case and on page 210, the court said:

"Congress has no power to interfere with police regulations relating exclusively to the internal trade of the State, nor can it by exacting a tax for carrying on a certain business, thereby authorize such business to be carried on within the limits of a state. License tax cases, 5 Wall. 452, 470, 471. The remarks of the chief justice in this case contain the substance of the whole doctrine: 'Over this (the internal), commerce and trade, Congress has no power of regulation nor any direct control. This power belongs exclusively to the state.'"

The court, in the same opinion on page 213, said:

"The question of the power of the states to lay down a scale of charges, as distinguished from their power to impose taxes, was first squarely presented to the court in Munn v. Illinois, 94 U. S. 113, in which a power was conceded to the state which prescribed regulations and fixed the charges of elevators used for the reception, storage and delivery of grain, notwithstanding such elevators were used for the storage of grain destined for other states. The decision was put upon the ground that elevators were property 'affected with a public interest,' and that

> from time immemorial in England and in this country from its first colonization it had been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing, to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold."

The court in the same opinion on page 214, and in passing upon the rights of a state to establish reasonable maximum rates for the transportation of freight and passengers within the State, said:

> "The next case, namely, that of the Chicago, Burlington & Quincy Railroad v. Iowa, 94 U. S. 155, 163, a bill was filed by the Chicago, Burlington & Quincy R. R. Co., an Illinois corporation, to restrain the prosecution of suits against it under 'an act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this State.' The complainant was also the lessee of the Burlington & Missouri Railroad in Iowa, the two roads being connected by a bridge which crossed the Mississippi river at Burlington, thus making a continuous railroad from Chicago to Plattsmouth on the Missouri river in Iowa. The case was held to be covered by Munn v. Illinois, the road, like the warehouse in that case, being situated within the limits of a single state. 'Its business,' said the chief justice, 'is carried on there, and its regulation is a matter of domestic concern.'"

In speaking to the question as to the power of a state to limit railroad charges for transportation within its own jurisdiction, this court, in the case of Stone v. Farmer Loan and Trust Co., 116 U. S. l. c. 324, said:

> "It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter or unless what is done amounts to a regulation of foreign or interstate comerce."

And on page 334 of the same decision, the court said:

> "It may, beyond all question by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to precent the company from discriminating against persons and places in Mississippi."

As the Federal Government cannot legislate for the states, it is entirely clear that the provisions of the interstate commerce act forbidding *discriminations* between localities, etc., apply only to discriminations in *interstate commerce,* and do not and could not condemn as *"discrimination"* difference between interstate and intrastate rates from given distributing centers to border stations inside and outside the State boundary. If a state has any power over its domestic commerce, it is clear that that power cannot be limited or affected by a federal law. If intrastate rates to any given point must be the same as interstate rates to competing points outside the State, then it is evident that the State possesses no commerce power, and the decisions of this Honorable Court heretofore are all amiss. But the State can prescribe reasonable maximum rates on intrastate traffic beyond question.

> Northern Pacific Ry. Co. v. North Dakota, 216 U. S. 579.

In sustaining the clause in the Constitution of the State of Kentucky, prohibiting a greater charge for a shorter than a longer haul within the State, and in holding that such a provision by reason of its remote and indirect effect was not an interference with interstate commerce, this court, in 183 U. S. l. c. page 518, said:

> "The final contention that section 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void need not detain us long.
>
> "It is plain that the provision in question does not in turn embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, and the long and short distances mentioned are evidently distances upon the railroad lying within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State.
>
> "It may be that the enforcement of the State regulation forbidding discrimination of rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful, must be direct and not the merely incidental effect of enforcing the police powers of a state."

To the same effect is New York ex rel. v. Hasterberg, 211 U. S. l. c. 41 and 42.

In the case of New York, Lake Erie & Western Railroad Co. v. Commonwealth of Pennsylvania, 158 U. S. l. c. 439, the court said:

> "The interference with the commercial power must be direct and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."

And on page 437, of the same opinion, the court said:

> "We have frequently had occasion to show that the existence of federal supervision over interstate commerce and the subsequent obligation upon the federal court to protect that right of control from encroachment on the part of the State, are not inconsistent with the power of each State to control its own internal commerce."

In affirming the right of a state to control the rates as to freight and passenger fares wholly within the State, in the case of Chicago, Burlington & Quincy Railroad Co. v. Cutts, 94 U. S., p. 155, the court said:

> "The objection that the statute complained of is void because it amounts to a regulation of commerce among the states has been sufficiently considered in the case of Munn v. Illinois. This road like the warehouse in that case, is situated within the limits of a single state. Its business is carried on there and its regulation is a matter of domestic concern."

In sustaining the constitutionality of an act of the Legislature of Wisconsin providing for a maximum of charges to be made by the Chicago & Northwestern Railroad Company

for fare and freight upon the transportation of persons and property carried within the State, or taken up outside the State and brought within it or taken up inside and carried without, this court, in the case of Peik v. Chicago & Northwestern Ry. Co., 94 U. S., p. 164, said:

> "In Munn v. Illinois (Ante 77) and Railroad Co. v. Iowa (Ante 94) we have just decided that the State may limit the amount of charges by a railroad company for fares and freight, unless restrained by some contract in the charter. * * * So far, this case is disposed of by those decisions."

In the case of Reagin v. Mercantile Trust Co., 154 U. S. 413, the question arose whether the Texas & Pacific Ry. Co., a corporation organized under an act of Congress was subject to the laws of Texas with respect to rates for transportation wholly within that State. This court, on page 416, said:

> "By the act of incorporation Congress authorized the company to build this road through the State of Texas. It knew that when constructed, a part of its business would be the carrying of persons and property from points within the State to other points also within the State, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given Congress. * * * We are of the opinion that the Texas & Pacific Ry. Co. is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates and other police regulations."

This case was quoted approvingly in the case of Smyth v. Ames, 169 U. S. l. c. 520. This court, in the case of Smyth v. Ames, supra, in discussing the Nebraska statute, on page 522, said:

> "It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a state, is a subject primarily within the control of a state."

In the Smyth v. Ames case it became necessary to interpret the act of July 1, 1862, relating to the Union Pacific Railway Company, a company organized for the purpose of consolidating several railroads under the authority and acts of Congress. The court, on page 522, said:

> "A question of rates for wholly local business was left under the control of the respective states through which the Union Pacific Railroad might pass. * * * We do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a state prescribing rates for transporting property on that road wholly between points within its territory."

In the case of Houston & Texas Central Ry. Co. v. Mayes, passing upon the Texas statutes providing penalties for failure to furnish cars to shippers, 201 U. S., page 328, the court said:

> "As the power to build and operate railways and to acquire land by condemnation, usually rests upon the State authorities, the Legislature may annex such conditions as they please with regard to intrastate transportation and such other rules

> regarding interstate commerce as are not inconsistent with the general right of such commerce to be free and unobstructed."

In discussing the Federal Employers' Liability Law this court, in the case of Howard v. Illinois Central Railroad Company, 207 U. S., at page 502, said:

> "It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local would obliterate all the limitations of power imposed by the Constitution and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

The court held said Employers' Liability Act unconstitutional, because it applied to railroads while engaged in intrastate commerce, that being a subject over which, the court said, the federal sovereignty had no jurisdiction.

In the case of Ames v. Union Pacific Ry. Co., 64 Fed. 171, involving the Nebraska Freight Rate Law, Mr. Justice Brewer, sitting at circuit, in the case, said:

> "It is true that the companies may for their own convenience, to secure business, or for any other reason, rearrange their interstate rates and make them conform to the local rates prescribed by the statute, but surely there is no legal compulsion. The statute of the states does not work a change in interstate rates any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroad companies cannot plead their own convenience, or the effect of competition between themselves and other companies, *in restraint of the otherwise undeniable power of the State.*"

It is evident, upon a moment's reflection, *that the reduction of state rates on intrastate traffic cannot as a matter of law, change interstate rates. It is an impossibility.*

The two classes of rates and traffic are separate, distinct and independent, and the raising or lowering of one cannot affect the other. The lowering of one works no *legal compulsion* on the roads to change the other, and the roads cannot plead their own convenience or business reasons or the effect of competition between themselves in restraint of the otherwise undeniable power of the State.

Ames v. Union Pacific Ry. Co., 64 Fed. 171.

Oregon R. and Navigation Co. v. Campbell, 173 Fed. l. c. 978 to 988.

Woodside v. Tonopah & G. R. Co., 174 Fed. l. c. 360.

Louisville & N. R. Co. v. Siler, 186 Fed. l. c. 198.

In re Arkansas Rate Cases, 187 Fed. l. c. 296.

Saunders v. Southern Express Co., 18 Interst. Com. Com'n R. 415, 421.

Hope Cotton Oil Co. v. Texas & Pacific, 12 Interst. Com. Com'n R., 265, 269.

Gibbons v. Ogden, 9 Wheat. 194.

Employers' Liability Cases, 207 U. S. 463.

Wabash Ry. Co. v. Ill., 118 U. S. 557, 565.

Chicago, etc. Ry. Co. v. Minn., 134 U. S. 418, 459.

Northern Securities Co. v. United States, 193 U. S. 197, 350.

Mo. Pac. Ry. Co. v. Kansas, 216 U. S. 262, 283, 284.

In the case of Sands v. Manistee River Improvement Company, 123 U. S. l. c. 295, this court held that the internal commerce of a state is as much under the control of the State as interstate commerce is under the control of the Federal Government. Following is the language of the court:

> "The internal commerce of a state, that is, the commerce which is wholly confined within its limits, is as much under its control as foreign or interstate commerce is under the control of the general government."

In the case of Louisville & N. R. Co. v. Eubank, 184 U. S. l. c. 42, the late Mr. Justice Peckham, in answering an assumed case, said:

> "In thus fixing the interstate rate, Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do; and on the

other hand, the State, by such a statute, regulates the local rate, but that it has the right to do. Congress does not directly or indirectly interfere with local rates by adopting their interstate rate."

In the case of Atlantic Coast Line Railroad Company v. North Carolina Corporation Company, 206 U. S. 1, speaking through Mr. Justice White, now Chief Justice, the court said:

> "The elementary proposition that railroads, from the public nature of the business by them carried on, and the interest which the public has in their operations, are subject as to their State business, to State regulations, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

In the case of Missouri Pacific Ry. Co. v. Kansas ex rel. Taylor, 216 U. S., at page 283, the court, in discussing the claim of the company that the order of the commission was void because it operated as a direct burden upon interstate commerce, said:

> "To support this proposition it is alleged that the charter of the interstate railroad company, the builder of the branch, provided for a road not only in Kansas, but to extend into Texas and Missouri, and, therefore, an interstate railroad. This being its character, the argument proceeds to assert that the traffic on the road, whatever be the nature of the traffic, was interstate commerce and beyond the con-

trol of the State of Kansas. But this simply confounds the distinction between state control over local traffic and federal control over interstate traffic. *To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation, unless at the same time it were held that the incorporation of the road had operated to extend the powers of the government of the United States to subjects which could not come within the authority of that government consistently with the Constitution of the United States.* Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system, and, therefore, did not destroy the power of Kansas over its domestic commerce or operate to bring under the sway of the United States matters of local concern; and, of course, could not project the authority of Kansas beyond its own jurisdiction. The charter, therefore, left the road for which it provided subject, as to its purely local or State business, to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate business was concerned, to the controlling power conferred by the Constitution upon the government of the United States."

* * * * * * * * *

"The order cannot be said to be an unreasonable exertion of authority because the power exercised was made operative to the limit of the right to do so. * * * It is said, that as a State line may be but a mere cornfield, and great expense must result to the railroad to establish necessary terminal facili-

ties in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by the order, not only to the State line, but twenty miles beyond, to Butler, on the Joplin line, where terminal facilities exist. * * * * But under the hypothesis upon which the contention rests, the operation of the train to Butler would be at the mere election of the corporation; and, besides, even if the performance of the duty of furnishing adequate local facilities in some respect affected interstate commerce, it does not necessarily result that thereby a *direct* burden on interstate commerce would be imposed."

DEDUCTIONS.

From these decisions it is conclusively settled that a state has the exclusive authority to regulate and control intrastate commerce, including rates and tolls therefor, and that it is equally well settled that should the laws of the State in controlling and regulating its intrastate commerce incidentally affect interstate commerce, that fact would in nowise affect the validity of such laws. In exercising the State's commerce power over the intrastate *rates*, it is not exempted, however, from the limitations of the *Fourteenth Amendment to the Federal Constitution as to confiscation, etc.* The *amount* named as to such *rates* has nothing to do with, and has never been regarded as an infringement upon the *commerce clause* of the Federal Constitution.

As to the regulation of commerce and the fixing of transportation rates, the boundaries of the states cannot be disregarded. They limit the jurisdictions of the two distinct sovereignties, each having the exclusive power of control over

a distinct part of the subject. To disregard state lines in rate regulation is to disregard state authority (the only authority there can be), over intrastate commerce. To disregard state lines leaves intrastate rates subject to no control by any power, because the Federal Government is without authority to legislate thereon.

The Federal and State laws on the subject of rates are in exact harmony with the Constitution. The interstate commerce act declares that the *provisions* thereof shall not apply to the transportation of passengers or property, or to the receiving, delivering, storing or handling of property "*wholly within one state, and not shipped to or from a foreign country, from or to any state or territory,*" and the Missouri acts in question specifically provide that the laws apply only to business, both freight and passenger, beginning and ending in this State. None of the laws involved require the carrier to do, or refrain from doing, anything with reference to the class of business subject to the jurisdiction of the other sovereignty. No question can be raised by a State as to the reasonableness of interstate rates, and no Federal question can be raised concerning intrastate rates, unless the rates are in and of themselves as applied to the intrastate business *confiscatory*, and this question does not arise under *section* 8, *article* I of the Constitution of the United States, but under the *fourteenth amendment*. The maximum rates as to each class of commerce are separately fixed and separately controlled. The Federal Government has no control over the State rates, except that they may be declared invalid if confiifiscatory, and the State has no control over the interstate rates. Neither can the two kinds of commerce be consolidated and regulated together by any public authority or power. The court said in the case of Hanley v. Kansas City Southern Railway Co., 187 U. S. l. c. 620: "*There can be but one rate fixed by but*

one authority, whether that authority be the State or Congress." If this were not so, then the constitutional diverse jurisdiction over the subjects would be destroyed. Neither can the chance location of cities and towns in this or other states destroy or affect the police power of Missouri.

C.

THE MERE RAISING OR LOWERING OF MAXIMUM PASSENGER OR FREIGHT RATES BY A STATE ON INTRASTATE COMMERCE CANNOT, AS A MATTER OF LAW, CHANGE INTERSTATE RATES. IT IS A LEGAL IMPOSSIBILITY. INTRASTATE AND INTERSTATE COMMERCE CONSTITUTE TWO SEPARATE, DISTINCT AND INDEPENDENT CLASSES, AND THE RATES OF EACH ARE FIXED AND CONTROLLED BY SEPARATE SOVEREIGNTIES. THE CHANGE IN THE RATES OF ONE BY THE STATE AND IN THE OTHER BY FEDERAL AUTHORITY ONLY OPERATES UPON AND AFFECTS ITS OWN SEPARATE, DISTINCT AND INDEPENDENT CLASS OF COMMERCE.

A State can tax the instruments of interstate commerce as other property of like description is taxed (Covington & Cincinnati Bridge Co. v. Ky., 154 U. S. l. c. 212; Louisville & Nashville R. R. Co. v. Ky., 161 U. S. l. c. 701), but the State cannot tax such commerce itself. And where the health, life and safety of the citizens of a State may be involved, the State may legislate as to these instruments of interstate commerce (Louisville & Nashville Ry. Co. v. Ky., 161 U. S. l. c. 701, 702).

While a State has the exclusive power to *regulate* intrastate commerce, yet in exercising that right it must not do so in such a *way* as to directly and substantially burden interstate commerce. The right of the State to *regulate and control* its intrastate commerce is absolute, but the *way* in which the right is to be exercised is limited by the injunction that it must not be such a way as will directly burden interstate commerce, just as the Federal Government is en-

joined from exercising *its* right to regulate and control interstate commerce in such a way as to interfere with intrastate commerce. (Howard v. Ill. Central R. R. Co., 207 U. S. 463.) That the State in exercising such absolute right should do so in a way which incidentally affects interstate commerce does not affect its validity.

The mere fixing, raising or lowering of maximum passenger or freight rates on intrastate commerce can in no way change or affect interstate rates, as in law, it is an impossibility. The law merely prescribing maximum rates on intrastate traffic, must not be confused with laws *purely regulatory* of the commerce and the instruments thereof. Laws simply naming *maximum rates,* on a Federal question, are measured solely by the *Fourteenth Amendment,* and the other class of laws by the *commerce clause.*

This was tersely stated by the late Mr. Justice Brewer in Ames v. Union Pacific Ry. Co. (C. C.) 64 Fed. 172, in the following language:

> "Again, it is insisted that this act interferes with interstate commerce in two ways: First, it establishes a classification of freights different from that which prevails west of Chicago; and, in the second place, by reducing local rates, it necessarily reduces rates on interstate business. Neither of these objections seems to me to be well taken. * * * To say, for instance, that because *railroad companies* have *voluntarily* placed flour in a certain class, on which a specified rate is to be charged, such *voluntary act of mere classification destroys the power of the State to establish a classification which puts flour in another class, and subject to another charge, is, to my mind, a most extravagant pretension.* Neither can I understand how the *reduction of local*

> *rates, as a matter of law*, interferes with interstate rates. It is true that the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates and make them conform to the local rates prescribed by the statute, but surely there is no *legal compulsion*. The statute of the State does not work a change in interstate rates any more than an act of Congress prescribing interstate rates would legally work a change in *local rates*. Railroad companies cannot plead their own convenience, or the effect of competition between themselves and other companies, *in restraint of the otherwise undeniable power of the State.*"

In the case of Woodside v. Tonopah & G. R. Co. et al., 184 Fed. l. c. 360, before Morrow, Circuit Judge, and Farrington and Van Fleet, district judges, the court said:

> "A rate fixed by a State railroad commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the railroad company for interstate traffic. Upon adjustment the latter rate must yield. This we think is a complete answer to the allegation of the bill in the Southern Pacific case."

This position is ably supported by the court in the case of Oregon R. and Navigation Co. v. Campbell, 183 Fed. l. c. 979. The court reasoned as follows:

> "So it is that the National Constitution is wholly a delegation of power, and the State Constitution a restriction or limitation of power; and the

State Legislatures may exercise all the reserved powers, save those which the people have withheld, it follows, very naturally and logically, from these premises, that the National Government is without power and authority to legislate or to supervise or control in any manner the movement of commerce which is entirely within a state, or that which is appropriately termed intrastate, as distinguished from interstate commerce. This arises simply from the want of power, the lack of delegation of power, to legislate touching that class of commerce. Upon the other hand, the sole power for the regulation of intrastate commerce rests with the State Legislatures. Congress has expressly recognized this distinction of powers in the passage of the act to regulate commerce of February 4, 1887. I Supp. Rev. St., p. 529. The act declares that the provisions thereof "shall not apply to the transportation of passengers or property, or to the receiving, delivering storage or handling of property, wholly within one state." So it has been pertinently observed by Mr. Justice Harlan, in Interstate Commerce Commission v. Brimson, supra, to the same effect."

On page 985, in the same case, the court said:

"So, if it be that the local state rates, as fixed and regulated by the State Railroad Commission on these commodities, unsettle in some way previously fixed trans-continental or interstate rates, that circumstance does not render the State rates invalid as an interference with interstate commerce. Let it be supposed that the State was the precursor in making rates for the transportation of purely intra-

state commerce, there could, then, at that juncture, be no conflict. Could it be contended that the State rate was invalid, because connecting railroads might desire to establish a transcontinental rate in combination with a local rate, also of their own making, which would conflict with the State rate? If so, the fixing of a state rate would be a precarious and evanescent thing, to be dissipated at the caprice of the transportaion companies, and the general government would usurp, in practical effect, the functions of the State government in the regulation of intrastate commerce. Such was not the purpose of the framers of the Federal Constitution. Nor was it the purpose of Congress itself in the adoption of the interstate commerce act, wherein was recognized, as has been noted before, the right of the State to regulate commerce wholly within its borders. The bill, therefore, in my opinion, states nothing that renders either the State railroad commission act or the order of the commission in conflict with the commerce clause of the Federal Constitution. This conclusion is borne out by the decisions of the Supreme Court.

"In Wabash, St. Louis & Pacific Railway Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, the court says:

" 'For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislatiure to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the state, and is not commerce

among the states, or interstate commerce, but is exclusively commerce within the state. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provisions concerning commerce among the states. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State which is not subject to the constitutional provision, and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other.'

"So in Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, the court says:

" 'It cannot be doubted that the making of rates for transportation by railroad companies along public highways, between points wholly within the limits of a state, is a subject primarily within the control of that state.

"The case of Gulf, Colorado and Santa Fe Railway Company v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, is highly instructive and is indicative of how the Supreme Court maintains the prerogative of the State government to regulate commerce within its borders. In this case a quantity of corn had been purchased in Hudson, S. D., for delivery at Goldthwaite, Texas. However, in the course of the dealings between the parties con-

cerned, the corn was billed to Texarkana, Tex. It remained in that place some five or six days, and was reconsigned from Texarkana to Goldthwaite, Tex. The court says:

'The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment.'

And it was determined that it was not. The shipment was, therefore, as between the points named, intrastate, and subject to state regulations. There previously existed a through interstate rate from Hudson, S. D., to Goldthwaite, Tex., but this did not deter the court from adjudging the carriage, under the circumstances recited, to be of intrastate commerce. See, also, the Daniel Ball, 10 Wall. 557, 565, 19 L. Ed. 999, Sands v. Manistee River Improvement Company, 123 U. S. 288, 295, 8 Sup. Ct. 113, 31 L. Ed. 149; and General Oil Co. v. Crain, 209 U. S. 211, 28 Supt. Ct. 475, 52 L. Ed. 754. This last case is further instructive as to when an interstate shipment ceases to be an interstate commerce. These authorities I deem to be decisive of the controversy.

"Nor does the case of Louisville & Nashville Railroad Co. v. Eubank, 184 U. S. 27, 22 Supt. Ct. 227, 46 L. Ed. 416, hold to a different view. It is rather illustrative of the same principal. The railroad had established a rate for the transportation of tobacco from Nashville, Tenn., to Louisville, Ky., at 12 cents per 100 pounds. The rate was so fixed, presumably, on account of water competition between the same points. It had also established a rate from Franklin, Ky., to Louisville, of 25 cents per 100 pounds. The road from Nashville to Louis-

ville ran through Franklin. Eubank shipped large quantities of tobacco from Franklin to Louisville, and paid the established rate, but subsequently sued the railroad company to recover back the excess between 12 cents and 25 cents per 100 pounds. This is the case that came to the Supreme Court. The theory upon which the suit was instituted was that the alleged overcharges was unlawful because the State of Kentucky, by its Constitution, had declared it so to charge more for a shorter than for a longer haul over the same line, under substantially similar circumstances and conditions. The circuit court of the State, from the judgment of which error was prosecuted to the Supreme Court, held, construing this Constitution, that it applied as well to carriage from without the State to points within. Thus construed, the Supreme Court held that the effect of the clause in question in the Kentucky Constitution was to regulate interstate commerce, and hence the judgment of the Kentucky court was reversed. In deciding the case, the court says:

"'The vice of the provision lies in the regulation of the rates between points wholly within the State, by the rates which obtain between points outside of and those which are within the state. * * * But the fact which vitiates the provision is, that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress.'

"Elsewhere, the court says:

> 'We fully recognize the rule that the effect of a state constitutional provision or of any state legislation upon interstate commerce must be direct, and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent, directly regulated, and in that event the effect of the provision is direct and important, and not a mere incident.'

It should be noted that this same clause in the Kentucky Constitution had been previously held by the Supreme Court of the United States (Louisville & Nashville Railroad Co. v. Kentucky, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298), as applied to places, all of which are wholly within the state, to violate no provision of the Federal Constitution, and it was only because an inferior court of Kentucky had put the construction upon the Kentucky Constitution as above indicated, that the clause was here held to be inimical to the commerce clause of the Federal Constitution.

"Neither does the case of Hall v. DeCuir, 95 U. S. 485, 24 L. Ed. 547, militate against the principle here applicable. The controversy there, was concerning a statute of the State of Louisiana, which required common carriers of passengers to extend to all persons, without regard to race or color, equal accommodations, rights and privileges, and the decision of the court proceeded upon the hy-

pothesis that the statute necessarily and directly affected interstate traffic. Mr. Chief Justice Waite says:

" 'But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within.'

"The cases of Swift & Co. v. U. S., 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, and Loewe v. Lawler, 208 U. S. 274, 28 Supt. Ct. 301, 52 L. Ed. 488, are concerning unlawful combinations in restraint of trade, which affected not only trade relations within a single state, but such relations also between the states, and hence lack applicability here."

In the case of Louisville & Nashville Railroad Co. v. Siler, 186 Fed. l. c. 198, before Warrington, circuit judge, and Sanford and Denison, district judges, our position is further sustained. In discussing the subject, the court said:

"Can it be that such combining and filing of local rates as interstate rates remove such local rates altogether from the jurisdiction of the state for purely state purposes?

"Surely Congress did not intend, by the interstate commerce acts, that interstate rates, made and filed as plaintiff's have been, should thereafter operate, not merely as interstate rates, but also as

intrastate rates. To say that Congress so meant is to ascribe to that body the purpose to take over to itself the whole rate-making power, both federal and state. The only theory upon which such a claim can be urged is that Congress has provided that interstate rates shall be filed with the Interstate Commerce Commission, and shall not thereafter be changed, except in a prescribed time and manner; and so the rates thus filed amount to an adoption by Congress or its commission, in the sense that the rates exist and must be enforced as federal-made rates. But it is expressly provided in each of the interstate commerce acts that the act shall not apply to the transportation of passengers or property 'wholly within one state, and not shipped to or from a foreign country from or to any state or territory.' Act Feb. 4, 1887, c. 104, paragraph 1, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154); act June 29, 1906, c. 3591, paragraph 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149); Act June 18, 1910; c. 309, paragraph 6, 36 Stat. 544. Moreover, although the interstate rates of complainant from Jeffersonville, Ind., or from Cincinnati, Ohio, to Bardstown, Ky., are the same as the rates charged from Louisville, Covington and Newport, Ky., still complainant's adherence to its interstate rates, and its observance of the new local rates in dispute, would not, under the interstate commerce act, be regarded as an intent to discriminate against localities like Jeffersonville or Cincinnati. Saunders v. Southern Express Co., 18 Interst. Com. Com'n R., 415, 421. Again, the state-made rates are not regarded by the Interstate

Commerce Commission as binding 'as a necessary measure of the interstate rate.' Saunders v. Southern Express Co., supra (421); Hope Cotton Oil Co. v. Tex. & Pac. Ry. Co., 12 Interst. Com. Com'n R. 265, 269. Conversely, under these decisions it is difficult to see why the State should be bound to adopt interstate rates; for, although the federal power is supreme respecting interstate rates, that would leave the State with no power at all in regard to local rates.

"What is claimed, is that conditions existing in Kentucky do not warrant a greater charge for the carriage of freight within Kentucky as interstate freight than for the carriage of purely local freight; and the averment that the company will make a reduction of its interstate rates to correspond with the rates in dispute, states nothing more than that it will do this for strictly business reasons. The question, then, comes at last to this: Whether a business or economic policy of a railroad company, as distinguished from a legal duty, to change its interstate rates to correspond with just and reasonable local rates imposed by the state for the transportation of traffic originating and ending wholly within the state, can be said to be a direct, and not merely an indirect, effect of the state's action. Thus, in distinguishing direct from indirect effect, can such conditions be made the basis of a presumption of fact, equivalent to a rule of law, such as a federal statute forbidding interstate rates from exceeding the sum of the local rates between given interstate points? One difference between such presumption and rule is the uncertainty whether the railroad company in

the end, at its election, will not decline to yield to the conditions created by the two sets of rates—interstate and local rates—and so defeat any presumption of fact that might be indulged in its favor by the courts, while the rule of law may always be certainly enforced through judicial decision. Another difference is that any eletcion by the company to change the interstate rates would seem to be an intervening cause, and consequently render such change an indirect result. Without deciding whether there may be facts attending the administration of a state law which show a result so inevitable, for business reasons, that the result should be held to be the direct effect of the law, though not specified in the law, yet as applied to this case the fallacy of ascribing equality to the presumption of fact and rule of law in both conclusive and permanent effect may, we think, be further tested by the consequences. The logic of the company's argument would release its local rates from governmental regulations altogether; for the United States could not fix the local rates, because they are local, and the state could not change them, because it would thereby cast a direct burden on interstate commerce. The inevitable effect would be that, so far as rate-making is conerned, the State Railroad Commission would have no reason to exist, and State regulation of State rates would become simply historic. Before accepting such a doctrine, let us briefly recall the views of the court of last resort touching the power of the state to regulate commerce carried on exclusively within its borders.

"In Gibbons v. Ogden, 9 Wheat. 1, 194, 6 L.

Ed. 23, Chief Justice Marshall, after defining the meaning of the words of the commerce clause, said:

"'It is not intended to say that those words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or effect other states.'

"This rule has ever been recognized as sound. As late as the decision rendered in the Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, Mr. Justice White, in announcing the opinion of the court, accepted the doctrine, both as to the United States and the states, as laid down by Chief Justice Marshall in Gibbons v. Ogden. After setting out the rule concerning the power of the United States, he said (207 U. S. 493, 28 Sup. Ct. 143 (52 L. Ed. 297):

"'Accepting, as we now do and as has always been done, this comprehensive statement of the power of Congress, we also adopt and reiterate the perspicuous statement made in the same case (9 Wheat. 194 (6 L. Ed. 23), of those matters of state control which are not embraced in the grant of authority to Congress to regulate commerce' (setting out the portion of the decision in Gibbons vs. Ogden, above quoted).

"We may call attention, also, to the language of Justice Miller in Wabash, etc., Ry. Co. v. Illinois, 118 U. S. 557, 565, 7 Sup. Ct. 4, 30 L. Ed. 244; also of the same learned justice in Chicago, etc. Ry. Co. v. Minnesota, 134 U. S. 419, 459, 10 Sup. Ct. 462, 703, 33 L. Ed. 970. 'In regard to the business of common carriers limited to points within a single state, that state has the legislative power to establish

the rates of compensation for such carriage;' and, also, the language of Mr. Justice Harlan in Northern Securities Co. v. United States, 193 U. S. 197, 350, 24 Sup. Ct. 436, 48 L. Ed. 679.

"Must this long-established power be now so construed as to eliminate the local rate-making power? We have seen that Congress has not so enacted. It has expressly provided that it shall not be. True, that body has not recognized any right in a state directly to hamper or burden interstate commerce; and all courts recognize the supremecy of the Federal power to regulate commerce among the states. Whether Congress has the power to forbid indirect interference with commerce among the states we need not consider; for we do not discover any attempt on its part to exercise such a power. We may now turn to the consideration of some decisions which we think present features of analogy to the present question:

In Louisville & Nashville Rd. Co. v. Eubank, 184 U. S. 27, 33, 22 Sup. Ct. 277, 279 (46 L. Ed. 416), the validity of section 218 of the Constitution of Kentucky was reaffirmed by the Supreme Court:

" 'We have already held in the case of Louisville & Nashville Railroad Company v. Kentucky, 183 U. S. 503, 518 (22 Sup. Ct. 95, 46 L. Ed. 298), that the section of the Kentucky Constitution above set forth, as applied to places all of which are within the state, violates no provision of the Federal Constitution.' "

In the case of St. Louis Southwestern Railway Company v. Allen et. al., Board of Railroad Commissioners of Arkansas, 187 Fed. l. c. 295, our position is further sustained. Judge Trieber, in discussing the subject, said:

"But does the fact that these intrastate rates bear such relation to interstate rates necessarily make the statutes of a state regulating charges for intrastate transportation by carriers engaged in interstate as well as intrastate commerce void? No authorities directly sustaining this claim have been cited to the court, although the cases in which statutes of this nature have been attacked are numerous. The only cases cited are those holding in general terms that state statutes which amount to some regulation of foreign or interstate commerce, or which directly or by their necessary operation burden interstate commerce, are invalid, as violative of the commerce clause of the National Constitution. On the other hand, Mr. Justice Brewer, in Ames v. Union Pacific Ry. Co. (C. C.), 64 Fed. 165, 172, affirmed sub nomine Smyth v. Ames, 169 U. S. 466, 18 Supt. Ct. 418, 42 L. Ed. 819, expressly held:

"'Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. * * * * * The statute of the state does not work a change in interstate rates, any more than an act of Congress prescribing interstate rates will legally work a change in local rates.'"

"Louisville & Nashville Ry. Co. v. Eubank, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416, cited for complainants, is not in point, as all that was decided in that case was that a state cannot compel carriers to adjust their intrastate rates with reference to their interstate rates."

And again on page 297 of said opinion, Judge Trieber said:

"The right of every sovereign state to regulate public service corporations and the rates to be

charged by them, subject to the provisions of the Fourteenth Amendment prohibiting deprivation of one's property without due process of law and other provisions of the National Constitution, rests upon the police powers, which 'are nothing more or less than the powers of government inherent in every sovereignty.' License Cases, 5 How. 583, 12 L. Ed. 256; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 393, 14 Sup. Ct. 1047, 28 L. Ed. 1014; Smyth v. Ames, 169 U. S. 466, 521, 18 Sup. Ct. 418, 42 L. Ed. 819.

"While, generally speaking, the police power of a state is said to extend to the protection of 'the public health, the public morals, and the public safety,' the law does not recognize these as the extent of the power, but, as stated, by Mr. Justice Harlan in Chicago, B. & Q. Ry. Co. v. Drainage Commissioners, 200 U. S. 561, 592, 26 Sup. Ct. 341, 50 L. Ed. 596:

" 'We hold that the police power of a state embraces regulations designed to promote the *public convenience and the general prosperity*, as well as the regulations designed to promote the public health, the public morals, or the public safety.'

"In Lake Shore, etc. Ry. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 703, the same learned justice, after reviewing the previous decisions of that court, states the conclusions of the court in the following language:

" 'Now it is evident that these cases (referring to the cases cited in the opinion), had no reference to the health, morals, or safety of the people of the state, but only to the public convenience. They recognized the fundamental principle that, outside

of the field directly occupied by the general government under the powers granted to it by the Constitution, all questions arising within a state, *that relate to its internal order or that involve the public convenience or the general good*, are primarily for the determination of the state, and that its legislative enactments relating to those subjects, and which are not inconsistent with the State Constitution, are to be respected and enforced in the courts of the Union, if they do not by their operation directly entrench upon the authority of the United States or violate some right protected by the National Constitution. The power here referred to is, to use the words of Chief Justice Shaw, the power 'to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same. (Commonwealth v. Alger, 7 Cush. (Mass.) 53, 85. * * * It may be that such legislation is not within the 'police power' of the state, as those words have been *sometimes*, although *inaccurately*, used; but in our opinion the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the states is entirely distinct from any power granted to the general government, although, when exercised, it may sometimes reach subjects over which national legislation can be constitutionally extended.'"

Again, on page 298 of said opinion Judge Trieber said:

> "In Noble State Bank v. Haskell, 219 U. S. 104, 31 Supt. Ct. 186, 55 L. Ed. —, decided January 3, 1911, involving a banking law providing for a guaranty fund to secure depositors, Mr. Justice Holmes, in speaking of the police power, said:
>
> " 'It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality of strong and preponderant opinion to be greatly and immediately necessary to the public welfare.'
>
> "Among other cases in which the same rule is recognized, the following may be appropriately referred to: Camfield v. United States, 167 U. S. 518, 525, 17 Sup. Ct. 864, 42 L. Ed., 260; Chicago, etc., R. R. Co. v. Nebraska, 170 U. S. 57, 73, 18 Sup. Ct. 513, 42 L. Ed. 948; Lake Shore, etc. Ry. Co. v. Smith, 173 U. S. 684, 689, 19 Sup. Ct. 565, 43 L. Ed. 858; Bacon v. Walker, 204 U. S. 311, 318, 27 Sup. Ct. 289, 51 L. Ed. 499; Halter v. Nebraska, 205 U. S. 34, 41, 27 Sup. Ct. 419, 51 L. Ed. 696; Western Union Tel. Co. v. Milling Co., 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088."

Judge Trieber, toward the close of his discussion upon this subject in said case, on pages 301 and 302, clinches the argument in the following terse language:

> "Another matter not to be overlooked is, if the State is without the power to regulate purely intrastate transportation because it affects interstate traffic indirectly, where is it vested? Congress is clearly without power to do so, and, of course, it cannot delegate to a commission a power it does not itself

possess. In Gibbons v. Ogden, 9 Wheat. 195, 6 L. Ed. 23, the leading case on that subject, the rule of law which has never been questioned since, but always followed, was settled that the power committed to Congress by the Constitution does not extend to commerce wholly within the State. In the language of Chief Justice Marshall:

"'The enumeration presupposes something not enumerated, and that something, if we regard the language or the subject of the sentence, must be the exclusive internal commerce of a state.'

'There can be but one rate, fixed by one authority, whether that authority be the State or Congress. Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617, 620, 23 Sup. Ct. 214, 47 L. Ed. 333.'

"If complainants' contention is correct, transportation companies, so far as the exclusively internal commerce of a state is concerned, are beyond all control, either from the State or National Government, for, as determined in Gibbons v. Ogden, supra, the Constitution excluded that class of commerce from the powers vested in Congress by the commerce clause, and, as all state rates indirectly affect interstate rates, they are, if complainant's contention is right, also void. See, also, on this point, the Employers' Liability Cases, 207 U. S. 463, 493, 28 Sup. Ct. 141, 52 L. Ed. 297.

"The result of such a construction would be that the states do not possess one of the most important powers inherent in every government. The adoption of such a construction by the courts would be justifiable only if any other would do violence to a plain provision of the National Constitution or principles of law so firmly established by previous decisions of the highest court of the land that there

is no longer room for construction. In the language of Mr. Justice Peckham in Addyston Pipe & Steel Co. vs. United States, 175 U. S. 211, 231, 20 Sup. Ct. 96, 104, 44 L. Ed. 136:

"'If neither Congress nor the State Legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, State or National, which can legislate upon that subject or prohibit such contracts. This cannot be the case.'"

Our position is further sustained by the court in the case of Southern Pacific Company et al. v. Campbell et al., in the Circuit Court of the United States for the district of Oregon, and not yet reported in the Federal Reporter. In speaking on the subject, Judge Bean said:

"A large part of the discussion herein is directed to the constitutionality of the Railroad Commission Act, and the contention that the order sought to be enjoined directly and materially affect interstate comerce. Both of these questions were considered and decided by this court in the Campbell case (O. R. N. v. Campbell, 173 Fed. 957). The opinion of Judge Wolverton in that case contains such an exhaustive, satisfactory and full discussion of the subject as to leave nothing to be added. The averments in the bill that the order of the Commission interferes with interstate commerce is but the conclusion of the pleader and is not in harmony with the facts alleged. Morrow, circuit judge, says: 'A rate fixed by a State Railroad Commission for intrastate traffic, if just and reasonable in and of itself, cannot be held to be unlawful and discriminatory because it may conflict with some rate fixed by the

railroad company for intersate traffic. Upon adjustment the latter rate must yield.'" (Wooside v. Tonopah & G. R. Co., 184 Fed. 360.)

We could quote from the decisions of the Interstate Commerce Commission, and cited in division "B" of this brief; also, from the decisions of this Honorable Court further, but those in point are included in the paragraphs and extracts above set out.

It would seem idle to further discuss a proposition so plain. The decisions in support of our position are overwhelming. Before them the opinion of Judge Sanborn, in the circuit court, in the Minnesota Rate Case must fall. Shepherd v. Northern Pacific Ry. Co., 184 Fed. Rep., p. 765.

The Sanborn opinion is without precedent, is a radical departure, a legal impossibility, and is founded upon neither law, logic nor reason. The opinion itself is its own undoing.

As the State rates, both passenger and freight, cannot, as a matter of law, interfere with interstate rates, that ends the contention of the appellee that the Missouri laws in question impinge upon the *commerce clause* of the United States Constitution. The right of the states to regulate intrastate rates must not be confounded with the power which the State may exercise along certain other lines, or along certain lines in the absence of Congress having legislated thereon. The Supreme Court of the United States has never held in a *single instance* that State laws prescribing the *maximum charges for passenger and freight traffic wholly within the State* were violative of the *commerce clause* of the Federal Constitution. If such rates were held invalid it was upon the ground that the property was taken without due process of law and that the rates as prescribed did not give a reasonable return upon the fair valuation of the property engaged in such traffic, and was, therefore, *confiscatory*. Indeed, under our form of government

and under the constitutional powers lodged in each of the two sovereignties, the State and the Federal, it is a *legal impossibility* for a State rate on intrastate commerce to interfere with or affect the interstate rate on interstate commerce. These two classes of commerce stand distinct and separate, and their rates are distinct and separate and controlled by separate sovereignties. The obeying of a law fixing State rates on commerce wholly within the State cannot, as a matter of law, work a discrimination in or affect interstate rates. The *discrimination* spoken of in the Interstate Commerce Act relates solely to interstate commerce. The *discrimination* under State laws and State Constitutions relates solely to intrastate traffic.

The appellee and other railroads cannot meet and agree upon classifications of freight such as Western classifications, etc., and from passenger associations, etc., and by agreement or individual action fix passenger and freight rates on their interstate traffic and by reason of such action, on their part stand immune from the constitutional classification of interstate and intrastate commerce, and stand immune from the police power of the State or its authority to fix reasonable maximum rates on intrastate commerce.

The roads cannot by agreement or by individual action arbitrarily or in any other manner name, fix and file passenger and freight rates on their interstate traffic, and then be herad to say that, if perchance, the State rates fixed thereafter by State legislation, should cause them for their *own convenience or for business reasons or to meet competition or for any other reason, short of legal compulsion,* to change their said interstate rates, that then, by reason of such fact, such State rates, *even though remunerative,* would be invalid.

That because the roads for their own convenience or for business reasons, etc., *voluntarily rearranged* their interstate rates and made them conform to the State rates fixed by law, such action would constitute the State legislation a di-

rect and substantial burden on interstate commerce and therefore violative of section 8 of article I of the Constitution of the United States. The important fact is overlooked that the change made in interstate rates was not made by reason of *legal compulsion, but by voluntary action.*

That when the rates fixed by a State on intrastate commerce, although giving a fair and reasonable return on the fair valuation of the property engaged in the commerce, causes the roads for business or for any other reason, short of legal compulsion, to change the rates which they had arbitrarily named and fixed on their interstate commerce and had filed, that the statute of the State must by reason thereof be declared violative of the commerce clause of the Constitution.

That the roads have a right to arbitrarily or in any other manner fix interstate rates on their interstate commerce at *any amount* they see fit and proper, by agreement or individual action, and that that right is supreme to and paramount to the police power of the State to name reasonable maximum freight and passenger rates on intrastate traffic. That the authority which was thought to be safely lodged in the State under the Federal Constitution must bow to the mere will, caprice, agreement or individual action of the railroads. That the roads can, by agreeing upon rates or by individually naming rates as to interstate traffic, take away from the State its police power to fix reasonable maximum rates on intrastate commerce. This is absurd, ridiculous and monstrous.

The reduction of State rates cannot as a matter of law, interfere with interstate rates. It is a legal impossibility and an impossibility in fact. They constitute two separate classes, and the raising or lowering of one can in no wise affect the other. As was stated by the late Mr. Justice Brewer, in the case of Ames v. U. P. Ry. Co., supra, the statutes of the State

cannot work a change in interstate rates any more than an act of Congress prescribing interstate rates can legally work a change in local rates. That the railroad companies cannot plead their own convenience or business reasons or the effect of competition between themselves and other companies, *in restraint of the otherwise undeniable power of the State.*

D.

THE ENFORCEMENT OF THE PASSENGER AND FREIGHT RATE ACTS IN QUESTION WOULD NOT, IN FACT, HAVE THE EFFECT OF DIRECTLY AND SUBSTANTIALLY BURDENING INTERSTATE COMMERCE.

Judge McPherson found the fact to be that said passenger law and said freight rate acts would not be a direct and substantial burden upon interstate commerce. In fact, there was no proof or offer of proof by appellee to show otherwise or from which any other deduction could be made.

The freight rate acts were never placed in effect, because the State officers were enjoined from enforcing same on the very day the laws became effective, and as a consequence were never given a trial.

These acts gave lower freight rates on *carload lots* on certain classes of freight and only affected *carload lots*. As *State carload* freight is only about 12 per cent of the *entire State freight business* of each of the companies, and as the acts involved only affect a very small per cent of the 12 per cent, therefore, as a fact, there could not be any substantial burden on interstate commerce. The entire business affected is but a very small fraction. This being true, a further discussion as to the freight acts substantially burdening Federal commerce would be a waste of time. This court has recognized that the effect of a reduction of rates is to stimulate business. In the case of Chicago & G. T. R. R. Co. v. Wellman, 143, U. S. 339, l. c. 343, the court said:

> "Must it be declared as a matter of law that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experi-

ence suggest the probability *that a reduction of rates will increase* the amount of the business, and, therefore, the earnings."

And this language was quoted with approval in the case of St. Louis, San Francisco R. R. Co. v. Gill, 156 U. S. 649.

As the freight rates were not placed in effect and the benefit to business activities by reason of reduced rates tested, then the question of their violating section 8 of article I of the Constitution of the United States is mere guess work and conjecture on the part of appellee, in each of the cases, even if it were possible in law for the reduction of State rates on State business to, by legal compulsion, change interstate rates.

The two-cent passenger fare law of 1907 was placed in effect, and no restraining order was issued as to that act during the trial. At the time the two-cent rate on intrastate travel went into effect the interstate rate on interstate travel was about 2.1 cents per mile. This would simply mean a difference of *one dollar in one thousand mile travel.* Leaving out the question the fact that it is a legal impossibility for the lowering of State rates to change by legal compulsion interstate rates, who would say that the difference of one dollar in one thousand miles would or could be a direct and *substantial burden* on interstate traffic? The interstate rates were afterwards and for *convenience and business reasons and to meet competition, voluntarily reduced* by *the road to less than two cents per mile.*

The total revenue for the test period shows in each case a substantial increase in the State passenger revenue under the reduced passenger rate. It earned more revenue under the reduced rate (two-cent rate), than under the three-cent law, and did so with a cheaper and more inferior service.

Notwithstanding Judge McPherson found against appel-

lee upon the contention, notwithstanding the facts above and the matters hereafter presented, and notwithstanding that the mere changing of the maximum passenger and freight rates on intrastate traffic cannot, as a matter of law, change or affect interstate rates or commerce within the meaning of section 8 of article I of the Constitution of the United States, yet, appellee continues to arbitrarily contend that as a matter of fact the passenger law and the freight laws in controversy interfere with interstate rates and are direct and substantial burdens upon interstate commerce. This we have seen cannot be so as a matter of law, and that being true the contention is ended. Aside from the legal question, we have shown it could not be true as a matter of fact. *There was no evidence in the cases at bar that such rates mentioned in the acts would as a matter of fact interfere with interstate rates or directly and substantially burden interstate commerce.* The freight rates in controversy relate solely to *carload lots* on certain *classes* of freight (but a mere mite of its total freight business in the state). In the cars there cannot be an ounce of interstate freight. The carload freight is loaded within the State of Missouri, and is delivered in the State, and does not pass beyond the line of the State in transit. This being true, the rate applies strictly to commerce within the State. If it should pass beyond the line of the State in transit, then, notwithstanding the fact, the initial point and the point of delivery are both within the State the shipment would be interstate traffic and the rates in question on such carloads would not apply.

Again, under affirmative proof appellee has charged *less* than the maximum rate prescribed by the statutes of Missouri on its other classes and kind of freight and less than the rates fixed by the Railroad and Warehouse Commissioners.

The cases at bar, however, are not burdened with these questions. *There is no evidence or proof in these cases what-*

ever that either the passenger or the freight rate acts involved would change any interstate rate, no matter how fixed or work a discrimination or burden interstate commerce, neither are there any premises from which any such deduction can be drawn.

The Missouri Statutes involved disclose upon the face of each act and specifically provide that such acts apply to passenger traffic and freight traffic wholly within the State of Missouri. There is nothing upon the face of the statutes to show any other purpose or intention, and the effect of a strict compliance with these freight and passenger laws will not and cannot legally affect interstate rates nor constitute them a direct and substantial burden upon interstate commerce. The contention of appellee is so puerile and so wanting in merit it is but a waste of time to pursue the subect further:

E.

THE LAW PRESUMES THE MISSOURI ACTS ARE VALID, AND THAT INCLUDES THE PRESUMPTION THEY DO NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

The law presumes the acts are valid and in that presumption falls the one that the laws do not impinge upon section 8, article I of the Constitution of the United States.

The *burden* of showing that the acts involved *do* violate said *commerce clause* rested upon appellee, and it made no proof or showing whatever in reference thereto. These principles and propositions are supported by the following cases from which we take pertinent extracts.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 754.

> "But it also should be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, *clearly and beyond all doubt*, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

City of Knoxville v. Knoxville Water Co., 212 U. S., 1, 8, 16, 17.

"There can be at this day no doubt, on the one hand, that the courts on constitutional grounds may exercise the power of refusing to enforce legislation nor, on the other hand, that the power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the court. * * * * * * Disregarding for the moment all the errors which were committed in the court below, the decision of this cause may be rested upon a broader ground, which is clearly indicated by the previous judgments of this court. The jurisdiction which is invoked here ought, as has been said, to be exercised *only in the clearest cases.* If a company of this kind chooses to decline to observe an ordinance of this nature and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States. In ex parte Young, 209 U. S. 123, the last word of caution by this court was said (p. 166): 'Finally it is objected that the necessary result of upholding this suit in the circuit court will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the state, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed

by all the judges of the Federal courts.' The same thought, in effect, was expressed in San Diego Land and Town Company v. National City, 174 U. S. 739, 754, 'judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.' "

Chicago, Milwaukee & St. Paul Railway Company v. Tompkins, 176 U. S. 167, 173.

"In approaching the consideration of a case of this kind we start with the presumption that the act of the Legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guarantee of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the State must be upheld."

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 91, 97.

"It (this court) has also ruled that the determination of the Legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates. * * * The authority of the Legislature to interfere by a regulation of rates is not an authority to destroy the principles of these decisions,

but simply to enforce them. Its prescription of rates is *prima facie* evidence of their reasonableness."

Reagan v. Farmers' Loan and Trust Company, 154 U. S. 362, 395.

"If the rates established by the commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just."

Henderson Bridge Company v. Henderson City, 173 U. S. 592, 614, 615.

"But in order to bring taxation imposed by a State or under its authority within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power of tax. As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

St. Louis & San Francisco Railway Company v. Gill, 156 U. S. 649, 666, 667.

"We do not feel warranted by all that appears in this record, in declaring invalid an act of the

Legislature of Arkansas, which on its face appears to be a legitimate exercise of power, and which has not been shown, *by clear and satisfactory evidence,* to operate unjustly and unreasonably, in a constitutional sense, against the plaintiff in error."

Mr. Justice Brewer in Day v. Chicago & Northwestern Railroad Company, 35 Fed. 866, 874.

"As said by Chief Justice Waite in the Munn case, supra: 'Every statute is presumed to be constitutional. The court ought not to declare one unconstitutional unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained,' or, has been elsewhere epigrammatically said: *'A doubt sustains the law.'* "

Louisville & Nashville Railroad Company v. Kentucky, 183 U. S. 503, 511.

"For the Federal Courts to interfere with the legislative department of the State government, when acting within the scope of its admitted powers, is always the exercise of a delicate power, one that should not be resorted to unless the reason for doing so is clear and unmistakable."

PART II.

THE FREIGHT AND PASSENGER RATES INVOLVED ARE NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARE NOT, THEREFORE, CONFISCATORY.

A.

STATEMENT OF LEGAL PRINCIPLES PRELIMINARY TO THE DISCUSSION OF THE CASES; ALSO AS TO THE NUMBER OF RATE CASES CONSIDERED BY THIS COURT.

In the presentation of the question as to whether or not the freight and passenger rates involved are confiscatory, there are certain fundamental principles of law to which it is well to call attention, preliminary to the discussion and review of the case and its evidence, and which legal principles are as follows:

I.

The Legislature of Missouri was authorized to prescribe reasonable maximum rates on intrastate traffic.

Stone v. Farmers' Loan & Trust Co., 116 U. S. 307.

Chicago & Grand Trunk R. R. Co. v. Wellman, 143 U. S. 739.

Lehigh Valley R. R. Co. v. Pennsylvania, 145 U. S. 192.

II.

The freight and passenger laws involved are presumptively valid.

Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U. S. 167, 173.

Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 91, 97.

Reagin v. Farmers Loan & Trust Co., 154 U. S. 362, 395.

III.

The burden of proving said laws are confiscatory rests upon the Chicago, Burlington & Quincy Railroad Company.

San Diego Land and Town Co. v. National City, 174 U. S. 739.

IV.

The Burlington must establish that the rates are confiscatory, clearly, unmistakably and beyond all doubt and by proof that is clear and convincing.

Wilcox v. Consolidated Gas Co., 212 U. S. 19.

Louisville & Nashville Ry. Co. v. Ky., 183 U. S. 503, 511.

Northern Pacific Ry. Co. v. North Dakota, 216 U. S. 579.

V.

All doubts must be resolved in favor of the validity of the freight act and passenger fare law involved.

Henderson Bridge Co. v. Henderson City, 173 U. S. 614, 615.

VI.

If the Court is in doubt one way or the other as to the laws giving a fair return upon the reasonable valuation of the properties employed, then that doubt sustains the laws.

Day v. Chicago, Northwestern R. R. Co., 35 Fed. (C. C.) 866, 874.

Northern Pacific Ry. Co. v. North Dakota, 216 U. S. 579.

VII.

The case is heard and the questions determined *de novo* by this Court and without regard as to how the questions were found and determined by the trial court.

Knoxville v. Knoxville Water Co., 212 U. S. 1.

VIII.

The rates, both freight and passenger, and business of the road in the State, may be considered in their entirety.

San Diego Land and Town Co. v. National City, 174 U. S. 739.

IX.

The road may be compelled to carry an article or articles at cost or even at a loss if the return on its entire business in the State affords it a reasonable compensation.

Northern Pacific Ry. Co. v. North Dakota, 216 U. S. 579.

X.

The road must affirmatively advise the Court what it has done with the receipts and earnings of the company on its entire business in the State, and must not only give the amount showing the disposition of its revenues, but must give the items thereof, its expenses in general statements and in large sums will not be accepted, lest the Court be misled into doing grievous wrong to the public.

Chicago & Grand Trunk R. R. Co. v. Wellman, 143 U. S. 739.

XI.

The service rendered by the road is an element which must be considered in determining the questions, because the road can only demand what the "services rendered by it are reasonably worth."

Minneapolis & St. Louis R. R. Co. v. Minn., 186 U. S. 257.

Smyth v. Ames, 169 U. S. 466.

XII.

Each case must be heard and determined upon its own particular facts and evidence. Reduction in rates does not necessarily mean reduction in revenue. They may have increased business volume and therefore increased earnings.

Smyth v. Ames, 169 U. S. 466.

Chicago, Grand Trunk R. R. Co. v. Wellman, 143 U. S. 739.

St. Louis, San Francisco R. R. Co. v. Gill, 156 U. S. 649.

B.

IN THREE CASES ONLY HAS THIS HONORABLE COURT HELD RATES FIXED BY LEGISLATIVE BODIES FOR PUBLIC SERVICE CORPORATIONS CONFISCATORY. IN EACH OF THE THREE CASES THE FACTS WERE EITHER ADMITTED OR NOT SERIOUSLY CONTROVERTED.

THIS COURT, ON THE OTHER HAND, HAS REFUSED TO HOLD SUCH RATES INVALID ON ACCOUNT OF BEING UNREASONABLE AND CONFISCATORY IN THIRTEEN OR MORE CASES.

The record written by this Honorable Court is the best evidence of its strict adherence to the rule that a statute, constitution or order fixing rates should not be suspended or held invalid save and except on the clearest proof and when the evidence is conclusive. That judicial interference should never occur unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property under the guise of regulation as to compel the courts to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use.

In three cases only has this Court held that rates fixed by legislative bodies were invalid. These cases are: Reagan v. Farmers Loan and Town Co., 154 U. S. 362; Covington & Louisville Turnpike Road Co. v. Sandford, 164 U. S. 578; and Smyth v. Ames, 169 U. S. 466.

(1) The Reagan case (154 U. S. 362) was an appeal from the decree of the Circuit Court of the United States for the Western District of Texas, enjoining a railroad company from continuing in effect rates fixed by the railroad com-

missioners of Texas. This Court affirmed the judgment as to the rates being confiscatory and reversed the case as to the injunction against the commissioners.

The State demurred to the bill of complaint and the case was considered and submitted on demurrer. The Court held that as the evidence had been taken and afterwards the State withdrew its answer and filed a demurrer that it looked like the evidence had sustained the allegations. The bill alleged, among other things, that the rate reduced the annual revenues $200,000.00, and that the rates as fixed were unreasonable and unjust. The full facts were pleaded and stated in detail and the Court said it must assume the allegations to be true as against the demurrer.

(2) The Covington Turnpike case (164 U. S. 578), reached this Court on writ of error to the Court of Appeals of Kentucky to review a judgment affirming the judgment of the Kenton Chancery Court enjoining the Covington Turpike Road from exacting tolls in excess of those fixed by the legislative act of 1890. This Court reversed the cause and remanded same for further proceedings.

This case came to the Supreme Court of the United States in the same condition, so far as pleadings were concerned, as the Reagan case. Certain parties secured an injunction against the turnpike, preventing the company from collecting rates under a prior statute. This injunction against the road was affirmed on appeal by the Court of Appeals of Kentucky.

The answer of the road plead the amount and sources of its revenue and the amount of its expenses and the cost of maintaining certain parts of the turnpike. It alleged that the proposed rate would prevent the road from receiving sufficient revenue to keep same in proper condition and maintain it and would prevent it from earning any dividends whatever for its stockholders. The plaintiffs demurred to

this answer and the demurrer was sustained. The case therefore was presented on the facts alleged in the answer, same being taken as true against the demurrer.

The Court held that the allegations were sufficiently full as to the necessary facts which must be pleaded and fairly raised the question whether the act impinged upon the constitutional rights of the road. That it made a *prima facie* case of the invalidity of the statute and that this Court could say so as a matter of law.

(3) The Ames case (169 U. S. 466) was an appeal from the decree of the Circuit Court of the United States for the District of Nebraska, enjoining the railroad companies from making a schedule of rates reducing them to those prescribed by the Nebraska act of 1893, and restraining the board of commissioners from hearing or determining any complaints against the roads, etc., granted by said decree. This Court affirmed the judgment.

The Court held that the kind and amount of business and cost thereof are factors which determine largely questions of rates. That one must consider the value of the property used by the road at the time and must also consider the value of the *service rendered*. The court also said:

> "Each cause must depend upon its own facts. Reduction of rates does not necessarily mean reduction of revenue. They may have increased business volume and therefore increased earnings."

In thirteen cases at least has this Court refused to sustain the action of the lower courts holding rates fixed by legislative bodies as unreasonable and confiscatory. These cases are as follows, to wit:

1. San Diego Land and Town Co. v. National City, 174 U. S. 739.

2. Chicago & Grand Trunk Railroad Co. v. Wellman, 143 U. S. 739.

3. Stanislaus Co. v. San Joaquin & K. River Co., 192 U. S. 201.

4. Dow v. Beidelham, 125 U. S. 680.

5. St. Louis & S. F. R. R. Co. v. Gill, 156 U. S. 649.

6. San Diego Land and Town Co. v. Jasper, 189 U. S. 439.

7. Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257.

8. Atlantic Coast Line R. Co. v. Florida, 203 U. S. 256.

9. Sea Board Air Line R. Co. v. Florida, 203 U. S. 270.

10. Alabama & V. R. Co. v. Mississippi R. Commission, 203 U. S. 496.

11. Knoxville v. Knoxville Water Co., 212 U. S. 1.

12. Wilcox v. Consolidated Gas. Co., 212 U. S. 19.

13. Northern Pacific Ry. Co. v. N. Dakota ex rel., 216 U. S. 579.

(1) The San Diego case (174 U. S. 739) was an appeal from the Circuit Court of the United States for the Southern District of California. The circuit court dismissed the bill and this Court affirmed the judgment of the circuit court. This Court, at page 754, said:

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the Court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

This Court said that the company was "not entitled to a given per cent." That "*rates in their entirety are to be considered.*" That the court could not look at them in any other light.

(2) The Wellman case (143 U. S. 345) came to this Court upon writ of error to the Supreme Court of Michigan to review the judgment affirming the judgment of the circuit court sustaining the validity of an act of the Legislature regulating passenger fares. This Court affirmed the judgment of the Supreme Court of Michigan. On page 346 the Court said:

> "Of what do these operating expenses consist? Are they made up partially of extravagant salaries, etc.? Surely before the courts are called upon to adjudge an act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, etc., *they should be fully advised as to what is done with the receipts and earnings of the company;* for if so advised it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interests and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by *exorbitant and unreasonable salaries or in some other improper way,* transfer its earnings into what it is pleased to call *operating expenses.*"

Again, on the same page the Court said:

> "Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to

the public and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements and without the *fullest disclosure of all material facts.*"

(3) The Stanislaus County case (192 U. S. 201) was an appeal from the Circuit Court of the United States for the Northern District of California to review a decree setting aside an ordinance regulating water rates. This court reversed the decision and ordered the bill dismissed.

(4) The Dow case (125 U. S. 680) came up upon writ of error to the Supreme Court of Arkansas to review a judgment of that court affirming the judgment of the state circuit court for the statutory penalty for the taking of illegal fares by the agent of the company for the carriage of passengers. This Court affirmed the judgment of the Supreme Court of Arkansas.

(5) The Gill case (156 U. S. 649) reached this Court upon writ of error to the Supreme Court of Arkansas to review a judgment of that court affirming the judgment of the county circuit court in favor of plaintiff for the penalty imposed by the Arkansas statute for overcharges by that company for passenger fares. This Court affirmed the judgment. The railroad filed a special plea raising Federal questions. Plaintiff's demurrer thereto was sustained. The road made offers tending to show rates unreasonable. The Court held the evidence offered did not cover the company's business as an entirety in Arkansas.

(6) The San Diego case (189 U. S. 439) was an appeal from the Circuit Court of the United States for the Southern District of California to review the court's action in dismissing the bill to have an ordinance of the board of supervisors fixing irrigation rates declared void for unreasonableness. This Court affirmed the judgment of the circuit court.

(7) The Minneapolis & St. L. R. Co. case (186 U. S. 257) was a writ of error to the Supreme Court of Minnesota to have this Court review the judgment of that court affirming the judgment of the district court of Ramsey county confirming rates made by the board on hard coal and directing the issuance of a writ of mandamus compelling compliance with said rates. This Court affirmed the judgment of the Supreme Court.

This Court, on page 268, said:

> "What the company is entitled to ask is a fair return from the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway that the services rendered by it are reasonably worth."

(8) The Atlantic Coast Line case (203 U. S. 256) was heard on writ of error to the Supreme Court of Florida to review the judgment of that court awarding a peremptory writ of mandamus to enforce an order of the railroad commission on local rates for carrying phosphate. This Court affirmed the judgment below.

(9) The Sea Board Air Line case (203 U. S. 270) was a writ of error to the Supreme Court of Florida to review a judgment of that court awarding a writ of mandamus enforcing an order of the railroad commissioners fixing local rates. This Court affirmed the judgment below.

(10) The Alabama & Vicksburg Railroad Company case (203 U. S. 496) was a writ of error to the Supreme Court of Mississippi to review a decree affirming a decree of the Chancellor of the Fifth Chancery District dismissing a bill to restrain the enforcement of an order of the railroad

commissioners for rates on grain and grain products. This Court affirmed the judgment of the Supreme Court of that state.

(11) The Knoxville Water Company case (212 U. S. 1) was an appeal from the Circuit Court of the United States for the Eastern District of Tennessee to review a decree enjoining the enforcement of a municipal ordinance fixing maximum water rates. This Court reversed and remanded the case with directions to dismiss the bill.

This Court held that the finding of the court was not conclusive in cases involving the overthrow of a legislative enactment or municipal ordinance. That this Court had absolute freedom in dealing with such subjects and was not bound by any findings below.

(12) The Consolidated Gas Company case (212 U. S. 19) was an appeal from the Circuit Court of the United States for the Southern District of New York to review a decree enjoining the enforcement of the New York statute regulating gas rates. This Court reversed and remanded the case with directions to dismiss the bill.

The Court said:

> "Upon a careful consideration of the case before us we are of opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the Legislature of the state of New York are in fact confiscatory."

(13) The Northern Pacific Railway Co. case (216 U. S. 579) was a writ of error to the Supreme Court of North Dakota to review a decree enjoining a carrier from further violation of a law fixing rates for the carriage of coal within the state. This Court affirmed the judgment of the Supreme Court of that state.

Mr. Justice Holmes, in speaking for the Court, said, on page 580:

> "But laying technical objections on one side and taking the fact as admitted, the argument for the state showed that there are too many elements of uncertainty in the calculation for us to say, if we could, as to which we intimate no opinion, that the conclusion is proved."

It was further said in the opinion that the road might be compelled to carry an article at cost or at a loss if the return on its entire business afforded reasonable compensation.

These cases evidence the care and caution with which this Honorable Court has approached the consideration of such cases and wherein it has been called upon to declare a rate invalid by reason of impinging upon the Fourteenth Amendment to the Federal Constitution.

C.

FACTORS NECESSARY TO KNOW IN ORDER TO DETERMINE WHETHER OR NOT THE RATES, BOTH FREIGHT AND PASSENGER, ARE CONFISCATORY OR AFFORD A REASONABLE RETURN.

In the first part of our brief we have discussed these acts and rates in connection with the commerce clause of the Constitution of the United States. We now propose, although the duty does not rest upon us, to satisfy this Honorable Court that neither said freight nor passenger rates are confiscatory, but that the freight rates and the passenger rates in Missouri, when considered separately or together, afford the complainant in each case a reasonable return upon the fair value of the properties employed. That no matter whether the State passenger traffic or State freight traffic be considered separately or the State business be considered in its entirety, the road in each case and in each and every instance receives a return far in excess of the legal rate of interest fixed by the laws of the State.

As each and every case must stand upon its own facts and evidence, there are certain factors which it is absolutely necessary to know in order to determine whether or not the rates in question are confiscatory. The determination of the question is merely the solution of an ordinary problem in arithemtic. The factors necessary to know are as follows:

NECESSARY FACTORS.

1. The reasonable value of the properties employed in the business.

2. The reasonable value of the properties less the franchise.

3. The amount of the value assignable to State freight traffic.

4. The amount of the value assignable to State passenger traffic.

5. Gross amount of revenue received.

6. The gross amount of revenue received from State freight traffic.

7. The gross amount of revenue received from State passenger traffic.

8. Total amount of expense.

9. Amount of expense assignable to State freight traffic.

10. Amount of expense assignable to State passenger traffic.

11. Taxes assignable to freight traffic.

12. Taxes assignable to passenger traffic.

13. Amount of diminution in revenue if freight acts had been in effect.

Each and every one of these factors must be established by *affirmative proof on the part of the road in each case.* It being in possession of the true facts, must prove same by the best evidence and cannot shift the burden nor relieve itself of proving same by evidence both clear and convincing.

In the division of the expenses between State and interstate traffic, each road must prove conclusively that the division has been made in a *correct and fair way.* That it has not burdened the State traffic with a greater amount or per cent of the expenses than it should justly bear. It must also affirmatively show that the expenses in conducting its business were *necessary and reasonable* and that the management has been economical. That such expenses are chargeable to one year rather than to a series of years. In other words, that the expenses are the ordinary operating

expenses and are not valuable, permanent and lasting improvements, the expense of which should cover a series of years. The complainant in each case failed to present any evidence or make proof on any of these matters—it proceeded as if no duty or burden rested upon it in relation thereto.

No presumption can be indulged in favor of any of these factors, but the same must be established by the best evidence and made clear beyond all doubt. A doubt in the establishment of any one of the *principal factors* would be the same as failure in the entire proof. If a doubt is entertained upon the whole case, then that doubt validates the acts.

We will gather these factors from the statement of each road and work the problems separately and in the following order, to wit:

1. ATCHISON, TOPEKA & SANTA FE RY. CO.
2. ST. LOUIS & SAN FRANCISCO R. R. CO.
3. THE MO., KANS. & TEXAS RY. CO.
4. THE CHICAGO, R. I. & PACIFIC RY. CO.
5. KANSAS CITY SOUTHERN RY. CO.
6. THE CHICAGO GREAT WESTERN RY. CO.
7. ST. LOUIS, K. C. & COLORADO R. R. CO.
8. ST. LOUIS & HANNIBAL RY. CO.
9. KANSAS CITY, CLINTON & S. RY. CO.

The values we take and use in our examples as assignable to the property engaged in the State traffic are the values assigned by the railroads and accepted by the court. The court committed error in so doing and we do not accept these values as correct. We take them simply to demonstrate even on the roads' and court's own basis the laws are remunerative. The court ascertained the value of the properties assignable to the State traffic, on the "REVENUE BASIS." This Honorable Court condemned that method in the case of Chicago, Mil-

waukee & St. Paul Railroad Company v. Tompkins, 176 U. S. 176.

This error of the court alone should reverse the cases at bar. It must be remembered that the revenue per ton per mile from STATE FREIGHT is more than TWICE as large as that per ton per mile from interstate freight. The revenue basis adopted by the court regards the value of property while being used for STATE TRAFFIC AS DOUBLE ITS VALUE WHEN USED FOR INTERSTATE TRAFFIC, while the truth is as demonstrated by the evidence that the State freight business earns approximately the SAME GROSS REVENUE FROM $5,000 WORTH OF PROPERTY AS THE INTERSTATE BUSINESS DERIVES FROM THE USE OF $10,000 WORTH OF PROPERTY.

If a mile of roadbed and track is worth $15,000 while a ton of INTERSTATE FREIGHT is moving over it, it is inconceivable how that within the next hour its value must be doubled to $30,000 as a ton of STATE FREIGHT passes over it.

REFERENCES ARE TO PRINTED RECORD IN BURLINGTON CASES.

The references to volumes and pages in this brief refer to the printed record in the Burlington cases, Nos. 130 and 134 of the present docket of the Supreme Court of the United States. The evidence offered, taken and received in the circuit court in each of the cases presented in this brief was printed in full in the record in the said Burlington cases. On appeal in the cases at bar a stipulation was filed in each and is set out in the separate record containing the pleadings in each of these cases, to the effect that the printed record in the said Burlington cases shall be taken and regarded as the evidence in each of the cases here briefed. This was done for the purpose of saving expense of reprinting so large a record and to prevent

the accumulation of unnecessary records in the Supreme Court of the United States. The pleadings, orders of the court, decrees, appeals, stipulations, etc., are printed in the separate record in each of these cases and the evidence in each of the cases is contained in the five printed volumes constituting the record in the said Burlington cases.

Atchison, Topeka and Santa Fe Ry. Company Case.

(No. 674. Knott et al, Apps., v. Atchison, T. & S. F. Ry. Co.)

NET PER CENT RETURN FIGURED ON ROAD'S OWN STATEMENTS, ETC.

I.

VALUATIONS.

THE TOTAL VALUE OF THE PROPERTIES OF THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY IN MISSOURI, TOGETHER WITH THE SEPARATE AMOUNTS OF THAT PART OF THE VALUATION, ASSIGNABLE TO STATE FREIGHT AND STATE PASSENGER TRAFFIC, AND UPON WHICH SEPARATE VALUES IT IS ENTITLED TO A REASONABLE RETURN. THE COMPANY, HOWEVER, IS NOT ENTITLED TO ANY RETURN UPON THAT PART OF THE VALUATION REPRESENTED BY ITS FRANCHISE.

The first factor which must be known is the reasonable value of the properties of the Santa Fe used in handling its traffic in Missouri, State and interstate. Having ascertained the fair value of those properties, it must next be ascertained what part of that value is to be assigned to the State passenger traffic and what part is to be assigned to the State freight traffic, to the end we may know upon what amount the company is entitled to a return in each of the acts, passenger and freight, involved and to the end we may know whether or not considering the whole rates and its entire State business, the company is receiving a reasonable return.

The court, on page 5311 of the printed record, found the value of the properties of the Santa Fe in Missouri, to be $15,091,212.00, and also found on the same page, that the value per mile was $43,326.00, and that the number of miles in Missouri was 348.31. The court, in fixing this valuation, fixed exactly the valuation placed upon same by the State Board of Equalization of the State of Missouri on the theory that the Board aimed to assess at one-third of the value of the properties. In other words, the evidence offered was

merely the judgment of the State Board of Equalization. That was not the way to prove and establish the fair value of the properties of the company in Missouri. This value was a matter of affirmative proof which the road could not shift and from which it could not relieve itself. The judgment of the Board may have been faulty and it may have reached a valuation for assessment purposes more than one-third. The court cannot accept and receive its judgment for the purposes of this case.

That this was the way in which the proof was made and upon which the court based its finding as to value, we cite the court to pages 5191 to 5224, printed record. We also call the court's attention to the following on page 1039, printed record:

> "It is agreed between the parties that the basis of the assessment is upon the basis of one-third of the value of the property, in the judgment of the Board."

The following quotation is taken from Santa Fe, exhibit No. 45, at page 4942, printed record:

> "The value fixed by the State Board of Equalization shows the rate to be confiscatory. The assessment for 1907 was $5,030,404.00, and this was as will be conceded by the State upon one-third of the value as determined by that body. This makes a valuation of $15,091,212.00."

Thus, it will be seen that the court has taken as the valuation of the properties to the *very cent three times* the valuation fixed by the State Board of Equalization, and did so on the strength of the evidence furnished by the records of the State Board of Equalization offered in evi-

dence and upon the theory that the Board had fixed the value at one-third. In other words, the proof of valuation rests solely upon the judgment of the State Board of Equalization in a record written for another purpose, to wit, taxation. Aside from all this, both the complainant and the court adopted the *wrong theory*, as to what constituted proof of the valuation and what were the elements thereof.

The value as found by the court included the franchise value. The assessment of the franchise value made by the State Board (Record V, pp. 5191-5224), of the lines of the Santa Fe in Missouri, evidence being offered by the road, was $1,276,647.00. This being the sum assessed as the value of the franchise for taxation on a supposed basis of one-third value, this sum must be multiplied by three on the above basis making the franchise value of the properties in the State belonging to the Santa Fe, amount to $3,829,-941.00.

The franchise value then is 25.3 per cent of the total valuation of the properties in the State as fixed by the Board of Equalization. When the franchise value is deducted from the value found by the court, it leaves the total valuation of the properties less the franchise, $11,261,271.00. Should this Honorable Court hold the proof as made as to the valuation of the properties was proper and sufficient, then the value upon which the returns should be figured are as follows:

Total valuation, including franchise, of all properties in Missouri of the Santa Fe, same being three times the amount fixed by the State Board of Equalization (Exhibit 45, p. 4942, Record).....	$15,091,212.00
Without franchise	11,261,271.00

Value of that part including franchise assignable to State freight is 5.27 per cent of $15,091,212.00, as State freight is 5.27 per cent of the gross earnings of all business, and is (Exhibit 77, supra).....	795,306.87
Value without franchise	593,468.67
Value of that part including franchise and assignable to State passenger traffic is 5.63 per cent of $15,091,-212.00, as State passenger traffic is 5.63 per cent of the gross earnings of all business, and is.....	849,635.22
Value without franchise.....	634,009.56

Inasmuch as the earnings, expenses and net earnings set forth in Exhibit 45 are those of one-half of a year only, the valuation shown above must be divided by two, in order to arrive at comparable bases for purposes of measuring the return thereon.

This gives us the following table as to the valuation of properties for the purpose of returns:

TABLE OF VALUATIONS.

Total valuation of all properties including franchise	$7,545,606.00
Total valuation of all properties without franchise	5,630,635.50
Value assignable to State freight, including franchise	397,653.43
Value assignable to State freight without franchise	296,734.33

Value assignable to State passenger, including franchise	424,817.62
Value assignable to State passenger without franchise	317,004.78
Value assignable to both State freight and passenger traffic, including franchise	822,471.05
Value assignable to both State freight and passenger traffic without franchise	613,739.11

These values as applied to the whole properties and as applied to the State freight traffic and the State passenger traffic, both with and without the franchise value, give us every factor in reference to valuation necessary to solve the problem.

II.

REVENUES.

REVENUE OF ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY IN MISSOURI FOR THE SIX MONTHS ENDING DECEMBER 31, 1907.

The second factor to be ascertained is the total amount of revenue the Atchison, Topeka & Santa Fe Railway Company has received from its business in Missouri, both State and interstate. This is the second step to be taken in solving the mathematical problem.

The total freight earnings in Missouri for the six month's ending Dec. 31, 1907 (Exhibit 77, page 5023, Printed Record), were $2,079,881.56. Full explanation and evidence as to exhibit is found on pages 4670 et seq. of record. Of this amount the earnings on the State freight business were $145,741.35, and the earnings on interstate freight business were $1,934,140.21.

The total passenger earnings in Missouri for the six months ending Dec. 31, 1907 (Exhibit 45, page 4931, printed record), were $685,768.31, of which amount the earnings on State passenger business were $155,690.35, and the earnings on interstate passenger business were $530,077.96. Explanation of and evidence as to exhibit 45, is found on pages 4669 et seq. of record.

Thus, the total passenger and freight revenue received by the Santa Fe from its entire business, State and interstate in Missouri for the six months ending Dec. 31, 1907, was $2,079,881.56 on freight and $685,768.31 on passenger, making a grand total of $2,765,649.87. From the above figures we have then the following table:

REVENUE TABLE.

STATE.

Revenue from State freight.....	$145,741.35
Revenue from State passenger.....	155,690.35
Total revenue State business....	$301,431.70

INTERSTATE.

Revenue from interstate freight.....	$1,934,140.21
Revenue from interstate passenger..	530,077.96
Total revenue interstate business	$2,464,218.17

GRAND TOTAL.

Total revenue State business, freight and passenger	$301,431.70
Total revenue interstate business, freight and passenger	2,464,218.17
Grand total	$2,765,649.87

The ton miles of State and interstate freight are set forth in Exhibit 45 (page 4956 of record), as follows:

State—8,157,683, or 4.34 per cent whole number ton miles.

Interstate—179,789,856, or 95.66 per cent whole number ton miles.

The passenger miles, according to the road's Exhibit 45, page 4957, record, are:

State—5,324,298, or 21.03 per cent of whole number.

Interstate—20,001,648, or 78.97 per cent of whole number.

The State freight earnings of $145,741.35 is 5.27 per cent of the gross earnings of all business in the State.

The State passenger earnings of $155,690.35 is 5.63 per cent of the gross earnings of all business in the State.

With these ascertained and known revenues from both the freight and passenger business in Missouri, and with the amounts definitely known as to each class of business, whether State or interstate, and with the number of ton miles of freight, both State and interstate, known and the per cent each class is of the whole, and with the number of passenger miles known, both State and interstate, and the per cent of each of the whole, we have all the factors as to revenue necessary to a proper consideration of the subject and solution of the problems being submitted. We have called attention to these specific revenues and the classes, State and interstate, and the ton miles and passenger miles and percentages, because they will be referred to later, and will be useful in reaching the proper final result.

III.

EXPENSES.

TOTAL EXPENSES OF THE A., T. & S. F. RAILWAY COMPANY FOR THE SIX MONTHS ENDING DECEMBER 31, 1907, TOGETHER WITH THE ASSIGNMENT OF THAT PART OF THE EXPENSE CHARGEABLE TO STATE AND INTERSTATE BUSINESS SEPARATELY, TOGETHER WITH AN ASSIGNMENT OF THE EXPENSE CHARGEABLE TO STATE FREIGHT AND STATE PASSENGER BUSINESS SEPARATELY. ALSO AMOUNT OF DIMINUTION OF REVENUE HAD FREIGHT ACTS BEEN IN FORCE.

The third factor necessary is the expense. The total amount of the expenses of the Santa Fe in the transaction of its entire business in Missouri, both State and interstate, for the six months ending Dec. 31, 1907, and as given by the road itself is, not including taxes and rentals (Exhibit 45), $1,934,613.77.

ASSIGNMENT OF FREIGHT EXPENSE.

Total freight expense undivided between State and interstate (Exhibit 77, page 5023, printed record), not including taxes and rentals, is $1,382,748.65

This total freight expense divided between State and interstate on the basis of ton miles (Exhibit 77), is as follows:

Expense chargeable to State freight not including taxes and rentals, is (Exhibit 77, printed record)..	$60,011.29
Expense chargeable to interstate freight is (Exhibit 77, printed record)....	1,332,737.36

ASSIGNMENT OF PASSENGER EXPENSE.

Total passenger expense undivided between State and interstate (Exhibit ——, printed record, ——) is	$572,167.20
Total passenger expense divided between State and interstate on the basis of passenger miles (Exhibit ——, is as follows:	
Expense chargeable to State passenger traffic is (Exhibit ——, printed record)	$120,269.54
That part of expense chargeable to interstate passenger traffic is (Exhibit ——, printed record).....	451,897.66

TAXES.

The amount of taxes and rentals assigned to State freight expense (Exhibit 76, p. 5022, record), is..	$1,404.49
The amount of taxes and rentals assigned to State passenger expense (Exhibit ——, p. ——, record), is	2,281.85

DIMINUTION IN REVENUE HAD FREIGHT LAWS INVOLVED BEEN ENFORCED.

If the freight laws in question had been in force, the diminution in revenue on State freight would have been (Exhibit ——, p. —— and p. 4767 record explaining the exhibit)	$13,885.87

We now have all the factors necessary to state the problem and work the example. There is no diminution to consider in the passenger fare law, because it was placed in force and the passenger revenue increased.

IV.

FREIGHT.

STATEMENT AND SOLUTION OF STATE FREIGHT EXAMPLE.

From the given factors the problem as to the net per cent return on State freight traffic is stated as follows:

If that part of the total valuation of the properties of the Atchison, Topeka & Santa Fe Railway Company in Missouri, assignable to the State freight traffic, including franchise, is $397,653.43, and without the franchise is $296.734.33; and, if the revenue of the road on its State freight traffic for the six months ending December. 31, 1907, is $145,741.35; and, if its expense in handling said State freight for that period, as set forth in the following tables is; and, if the Santa Fe had obeyed the Missouri freight laws involved, its revenue on State freight for said period would have been reduced $13,885.87; what per cent would the road have received on its said valuation, both with and without the franchise, had the freight laws involved been in force?

They say, however, there is some evidence to the effect that it costs 30 per cent. more *per ton mile* to handle State freight than it does to handle interstate freight. Very well, we will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $77,019.10 (Vol. V, Exhibit 76, Record 5022).

NO. 1.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 30 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight.....		$145,741.35
Expense of handling State freight (Exhibit 76, p. 5022 Record)	$77,019.10	
Taxes assignable to State freight	1,404.49	
Total expense	$78,423.59	$78,423.59
Net profit on State freight.....		$67,317.76
Diminution in State freight revenue if the freight laws involved had been in force		13,885.87
Net revenue had freight laws involved been in force		$53,431.89
The valuation of that part of the whole properties assigned to State freight, including franchise value, being $397,653.43, and the net returns, including the diminution had the freight laws involved been in force, being $53,431.89, then, if said freight laws had been in force, the Santa Fe would have received a net return on said valuation (divide $53,431.89, by $397,653.43) of		13.44%

The per cent. of return, less the franchise value assignable to State freight, is (divide $53,431.89 by $296,734.33..... 18.00%

Thus we see even though we charge State freight with 30 per cent more expense per ton mile than we charge interstate freight, the Santa Fe gets a return of 13.44 per cent on that part of the valuation assigned to State freight, including franchise value, and a return of 18.00 per cent with the franchise value deducted. So with these freight laws involved in force it would receive 13.44 per cent return in the one instance and 18.00 per cent return in the other.

They say, however, there is some evidence to the effect that it costs 50 per cent more *per ton mile* to handle State freight than it does to handle interstate freight. (Judge McPherson found that on the "revenue basis," a different basis to the *ton mile*, it cost 50 per cent more to handle State freight than it did interstate freight, Vol. V, p. 8, page 5310, Record. As State freight rate is two times as much as the interstate rate, Exhibit 36, Vol. II, page 2407, Record, this finding that it costs 50 per cent more is a finding that it costs *three times* as much to handle *State freight as interstate freight* on the revenue basis because the rate in one is *twice* as great as the other, and which is ridiculous and absurd.) We will solve the example, however, on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $88,081.09 (Vol. V, Exhibit 76, Record 5022).

NO. 2.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 50 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight.....		$145,741.35
Expense of handling State freight (Exhibit 76, p. 5022, Record	$88,081.09	
Taxes assignable to State freight	1,404.49	
Total expenses	$89,485.58	$89,485.58
Net profit on State freight.....		$56,255.77
Diminution in State freight revenue if the freight laws involved had been in force		13,885.87
Net revenue had freight laws involved been in force		$42,369.90
The valuation for that part of the whole properties assigned to State freight including franchise value being $397,653.43, and the net return including the diminution had the freight laws involved been in force, being $42,369.90, then if said freight laws had been in force the Santa Fe would have received a net return on said valuation (divide $42,369.90 by $397,653.43) of		10.65%

The per cent of return, less the franchise value assignable to State freight is (divide $42,369.90 by $296,734.33 being total value less the franchise value assigned to State freight).....	14.28%

So, on the basis of State freight costing 50 per cent more per ton per mile to handle than interstate freight gives a return of 10.65 per cent with the franchise value included and 14.28 per cent with franchise value deducted.

V.

PASSENGER.

STATEMENT AND SOLUTION OF STATE PASSENGER EXAMPLE.

From the given factors the problem as to the net per cent return on State passenger traffic is stated as follows:

If that part of the total valuation of the properties of the Atchison, Topeka & Santa Fe Railway Company in Missouri, assignable to the State passenger traffic, including franchise, is $424,817.62, and without the franchise value is $317,004.68; and, if the revenue of the road on its State passenger traffic for the six months ending December 31, 1907, is $155,690.35; and, if its expense in handling said State passenger traffic for that period is, as set forth in the following tables, what per cent did the road receive on its said valuation, both with and without the franchise value?

(The passenger rates were placed in force and there was no diminution of revenue, but on the other hand the State passenger traffic increased under the reduced rate.)

There is evidence to the effect that it costs 10 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $110,543.70.

NO. 1.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 10 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic.....		$155,690.35
Expense of passenger traffic (Exhibit ——, p. —— Record)	$110,543.70	
Taxes and rentals assignable to passenger traffic	2,281.85	
Total expense	$112,825.55	$112,825.55
Net profit on State passenger traffic.....		$42,864.80
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $424,817.62, and the net returns being $42,864.80, then the Santa Fe received a net return on said valuation (divide $42,864.80 by $424,817.62 of.		10.09%
Upon the valuation, less the franchise value, the Santa Fe received a net return (divide $42,864.80 by $317,004.78 of..		13.52%

On the basis that the State passenger traffic costs 10 per cent less per passenger mile than the interstate traffic, the Santa Fe received a net return of 10.09 per cent on that part of the valuation, including franchise value, assigned to State passenger traffic, and received a net return of 13.52 per cent with the franchise value deducted.

There is evidence to the effect that it costs 20 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $100,415.34.

NO. 2.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 20 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic.....		$155,690.35
Expense of passenger traffic (Exhibit ——, p. ——, Record.	$100,415.34	
Taxes and rentals assignable to passenger traffic	2,281.85	
Total expense	$102,697.19	$102,697.19
Net profit on State passenger traffic.....		$52,993.16
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $424,817.62, and the net returns being $52,993.16, then the Santa Fe received a net return on said valuation (divide $52,993.16 by $424,817.62), of		12.47%
Upon the valuation, less the franchise value, the Santa Fe received a net return (divide $52,993.16 by $317,004.78) of.		16.71%

On the basis that the State passenger traffic cost 20 per cent less per passenger mile than the interstate traffic, the Santa Fe received a net return of 12.47 per cent on that part of the valuation, including franchise value assigned to State passenger traffic, and received a net return of 16.71 per cent with the franchise value deducted.

RECAPITULATION.

The actual working of the problem, both freight and passenger, discloses the fact that the Santa Fe's return upon the valuation of the property assigned to State freight on the several cost bases ranges from 10.65 per cent to 13.44 per cent with the franchise value included, and from 14.28 per cent to 18.00 per cent with the franchise value deducted. That the return upon the valuation of the property assigned to State passenger traffic on the several cost bases ranges from 12.47 per cent to 10.09 per cent with the franchise value included, and from 13.52 per cent to 16.71 per cent with the franchise value deducted.

Without further comment at this place we will give a recapitulation of the return in a table below and which speaks for itself in language more forceful than the sophistries of counsel, more forceful than the findings of the court based upon conjecture, and more forceful than the biased opinions of interested witnesses given without any actual knowledge or foundation upon which to base them. These results give us the real truth based upon and worked from the Santa Fe's figures in the case.

RECAPITULATION TABLE—FREIGHT RETURNS.

1. Return on valuation, including franchise on basis costs 30 per cent more per ton mile to handle State than interstate freight..... 13.44%

With franchise value deducted..... 18.00%

2. Return on valuation, including franchise on basis costs 50 per cent more per ton mile to handle State than interstate freight..... 10.65%
With franchise value deducted..... 14.28%

RECAPITULATION TABLE—PASSENGER RETURNS.

1. Return on valuation, including franchise on basis costs 10 per cent less per passenger mile to handle State traffic..... 10.09%
With franchise value deducted..... 13.52%
2. Return on valuation, including franchise on basis costs 20 per cent less per passenger mile to handle State traffic..... 12.47%
With franchise value deducted..... 16.71%

From the recapitulation tables we find that the returns to the road upon each and every basis of dividing expenses between State and interstate traffic, upon both freight and passenger laws involved, give adequate and reasonable returns, and even more.

Under the law (174 U. S. 739, supra) the rates, both freight and passenger, in the State and the business of the Santa Fe on those rates must be considered in their entirety.

The revenue upon State freight, as we have seen, is $145,741.35. The revenue upon State passenger traffic is $155,690.35, making the total revenue of both freight and passenger in the State $301,431.70. The total valuation of that part of the property assigned to State freight and State passenger traffic, including franchise, is $822,471.05, and without the franchise is $613,739.11. We shall, therefore, figure the returns upon both the freight and passenger business in the State considered together and upon the three bases upon which the State freight and State passenger traffic was figured.

VI.

STATE FREIGHT AND PASSENGER TRAFFIC CONSIDERED TOGETHER.

We will now figure the two together, as example No. 1 was figured as to each separately; that is to say, on the basis that the expense of handling State freight was 30 per cent more than interstate freight and the cost per passenger mile on State traffic was 10 per cent less than interstate passenger traffic.

NO. 1.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 30 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS 10 PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and State passenger traffic		$301,431.70
Expense of State freight, including taxes and rentals..	$78,423.59	
Expense of State passenger traffic, including taxes and rentals	112,825.55	
Total expense		$191,249.14
Net profit on State freight and passenger traffic		$110,182.56

Diminution in State freight revenue if the freight laws involved had been in force	13,885.87
Net revenue had freight laws involved been in force	$96,296.69
The value of the property used for State freight and passenger traffic, including franchise, is $822,471.05. The net returns being $96,296.69, by making the division, gives a net return of	11.70%
Upon the valuation, less the franchise, the Santa Fe received a net return (divide $96,296.69 by $613,739.11) of	15.69%

On the entire State business on this basis the return is 11.70 per cent with the franchise value included, and 15.69 per cent with the franchise value deducted.

We will now figure the two together, as example No. 2 was figured as to each; that is to say, on the basis that the expense of handling State freight was 50 per cent more than interstate freight, and the cost per passenger mile on State traffic was 20 per cent less than interstate passenger traffic.

NO. 2.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 50 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE AND THAT THE EXPENSE FOR STATE PASSENGER TRAFFIC IS 20 PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Net profit on State freight and passenger Revenue from State freight and State passenger traffic	$301,431.70

Expense of State freight, including taxes and rentals.	$89,485.58	
Expense of State passenger traffic, including taxes and rentals	102,697.19	
Total expense		$192,182.77
Net profit on State freight and passenger traffic		$109,248.93
Diminution in State freight revenue if the freight laws involved had been in force		13,885.87
Net revenue had freight laws involved been in force		$95,363.06
The value of the property used for State freight and passenger traffic, including franchises being $822,471.05, and the net returns being $95,363.06, by making the division, gives net return of		11.59%
Upon the valuation less the franchise, the Santa Fe received a net return (divide $95,363.06, by $613,739.11), of. . . . . ,		15.54%

In this example with the franchise included, the return is 11.59 per cent, and with the franchise deducted the return is 15.54 per cent.

So viewing the rate question separately as to freight or separately as to passenger rates, or considering the State business in its entirety in each and every instance, exceptionally reasonable returns have been given to the road. In all these examples we figured the franchise in so as to demonstrate that even when the franchise value was considered the returns were ample. As a matter of law, however, the Santa Fe is not entitled to any returns upon the franchise

value. We will now give the final result in the following table, leaving out the returns with the franchise value included:

FINAL RECAPITULATION OF RETURNS—TABLE OF RETURNS ON EACH SEPARATE CLASS, FREIGHT AND PASSENGER, AND WHEN CONSIDERED TOGETHER, FRANCHISE VALUE DEDUCTED.

Return State freight, 30 per cent extra cost basis	18.00%
Return State passenger, 10 per cent less than interstate cost basis	13.52%
Return State freight and passenger traffic together	15.69%
Return State freight, 50 per cent extra cost basis	14.28%
Return State passenger, 20 per cent less than interstate cost basis	16.71%
Return State freight and passenger traffic together	15.54%

St. Louis & San Francisco Railroad Co. Case.

(No. 672. Knott et al., Apps., v. St. Louis & S. F. R. R. Co.)

NET PER CENT RETURN FIGURED ON ROAD'S OWN STATEMENTS, ETC.

I.

VALUATIONS.

THE TOTAL VALUE OF THE PROPERTIES OF THE ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY IN MISSOURI, TOGETHER WITH THE SEPARATE AMOUNTS OF THAT PART OF THE VALUATION, ASSIGNABLE TO STATE FREIGHT AND STATE PASSENGER TRAFFIC AND UPON WHICH SEPARATE VALUES IT IS ENTITLED TO A REASONABLE RETURN. THE COMPANY, HOWEVER, IS NOT ENTITLED TO ANY RETURN UPON THAT PART OF THE VALUATION REPRESENTED BY ITS FRANCHISE.

The first factor which must be known is the reasonable value of the properties of the railroads used in handling its traffic in Missouri, State and interstate. Having ascertained the fair value of those properties, it must next be ascertained what part of that value is to be assigned to the State passenger traffic and what part is to be assigned to the State freight traffic, to the end we may know upon what amount the company is entitled to a return in each of the acts, passenger and freight, involved and to the end we may know whether or not considering the whole rates and its entire State business, the company is receiving a reasonable return.

The court, on page 5311 of the printed record, found the value of the properties of the St. Louis & San Francisco in Missouri, to be $61,238,414.70, and also found on the same page, that the value per mile was $36,259.00, and that the number of miles in Missouri was 1,688.89. The court, in fixing this valuation, fixed exactly the valuation placed upon same by the State Board of Equalization of the State of Missouri on the theory that the Board aimed to assess at one-third

of the value of the properties. In other words, the evidence offered was merely the judgment of the State Board of Equalization. That was not the way to prove and establish the fair value of the properties of the company in Missouri. This value was a matter of affirmative proof which the road could not shift and from which it could not relieve itself. The judgment of the Board may have been faulty and it may have reached a valuation for assessment purposes more than one-third. The court cannot accept and receive its judgment for the purposes of this case.

That this was the way in which the proof was made and upon which the court based its finding as to value, we cite the court to pages 5191 to 5224, printed record. We also call the court's attention to the following on page 1039, printed record:

> "It is agreed between the parties that the basis of the assessment is upon the basis of one-third of the value of the property, in the judgment of the Board."

The following quotation is taken from S. L. & S. F., exhibit No. 1, at pages 4793 and 94, printed record.

> "The value fixed by the State Board of Equalization shows the rate to be confiscatory. The assessment for 1907, was $20,412,804.90, and this was as will be conceded by the State upon one-third of the value as determined by that body. This makes a valuation of $61,238,414.70."

Thus, it will be seen that the court has taken as the valuation of the properties to the *very cent three times* the valuation fixed by the State Board of Equalization, and did so on the strength of the evidence furnished by the records of the State Board of Equalization offered in evidence and upon

the theory that the Board had fixed the value at one-third. In other words, the proof of valuation rests solely upon the judgment of the State Board of Equalization in a record written for another purpose, to wit, taxation. Aside from all this, both the complainant and the court adopted the *wrong theory*, as to what constituted proof of the valuation and what were the elements thereof.

The value as found by the court included the franchise value. The assessment of the franchise value made by the State Board (Record V., pp. 5191-5224), of the lines of the St. L. & San F. in Missouri, evidence being offered by the road, was $3,808,970.50. This being the sum assessed as the value of the franchise for taxation on a supposed basis of one-third value, this sum must be multiplied by three on the above basis making the franchise value of the properties in the State belonging to the St. L. & San. F., amount to $11,426,911.50.

The franchise value then is 18.6 per cent of the total valuation of the properties in the State as fixed by the Board of Equalization. When the franchise value is deducted from the value found by the court, it leaves the total valuation of the properties less the franchise, $49,811,503.20. Should this Honorable Court hold the proof as made as to the valuation of the properties was proper and sufficient, then the value upon which the returns should be figured are as follows:

Total valuation, including franchise, of all properties in Missouri of the St. L. & San F., same being three times the amount fixed by the State Board of Equalization (Exhibit 64, p. 4988, Record)	$61,238,414.70
Without franchise	49,811,503.20

Value of that part including franchise assignable to State freight is 14.69 per cent of $61,238,414.70 as State freight is 14.69 per cent of the gross earnings of all business, and is (Exhibit 64, supra).....	$8,995,923.12
Value without franchise.....	7,317,309.82
Value of that part including franchise and assignable to State passenger traffic is 17.90 per cent of $61,238,-414.70 as State passenger traffic is 17.90 per cent of the gross earnings of all business (Exhibit 61, Record 4,984), and is.....	10,961,676.23
Value without franchise.....	8,916,259.07

In as much as the earnings, expenses and net earnings set forth in Exhibit 61 and 64 are those of one-fourth year only, the valuations shown above must be divided by four in order to arrive at comparable bases for purposes of measuring the return thereon.

This gives us the following table as to the valuation of properties for the purpose of returns:

TABLE OF VALUATIONS.

Total valuation of all properties including franchise.....	$15,309,603.65
Total valuation of all properties without franchise.....	12,452,875.80
Value assignable to State freight, including franchise.....	2,248,980.78
Value assignable to State freight without franchise	1,829,327.45

Value assignable to State passenger, including franchise.....	2,740,419.06
Value assignable to State passenger without franchise.....	2,229,064.77
Value assignable to both State freight and passenger traffic, including franchise.	4,989,399.84
Value assignable to both State freight and passenger traffic without franchise.	4,058,392.22

These values as applied to the whole properties and as applied to the State freight traffic and the State passenger traffic, both with and without the franchise value, give us every factor in reference to valuations necessary to solve the problem.

II.

REVENUES.

REVENUE OF ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY IN MISSOURI FOR THE THREE MONTHS ENDING SEPTEMBER 30, 1907.

The second factor to be ascertained is the total amount of revenue the St. Louis & San Francisco Railroad Company has received from its business in Missouri, both State and interstate. This is the second step to be taken in solving the mathematical problem.

The total freight earnings in Missouri for the three months ending September 30, 1907 (Exhibit 64, page 4,986, Printed Record), were $2,878,010.23. Full explanation and evidence as to exhibit is found on pages 4543 et seq. of record. Of this amount the earnings on the State freight business were $595,146.09, and the earnings on interstate freight business were $2,282,864.14.

The total passenger earnings in Missouri for the three months ending September 30, 1907 (Exhibit 61, page 4982, printed record), were $1,170,816.30, of which amount the earnings on State passenger business were $724,756.43, and the earnings on interstate passenger business were $446,059.87. Explanation of and evidence as to exhibit 61, is found on pages 4514, et seq. of record.

Thus, the total passenger and freight revenue received by the St. L. & S. F. from its entire business, State and interstate in Missouri for the three months ending September 30, 1907, was $2,878,010.23 on freight and $1,170,816.30 on passenger, making a grand total of $4,048,826.53. From the above figures we have then the following table:

REVENUE TABLE.

STATE.

Revenue from State freight.....	$595,146.09
Revenue from State passenger....	724,756.43
Total revenue State business.....	$1,319,902.52

INTERSTATE.

Revenue from interstate freight....	$2,282,864.14
Revenue from interstate passenger	446,059.87
Total revenue interstate business..	$2,728,924.01

GRAND TOTAL.

Total revenue State business, freight and passenger.....	$1,319,902.52
Total revenue interstate business, freight and passenger.....	2,728,924.01
Grand total.....	$4,048,826.53

The ton miles of State and interstate freight are set forth in Exhibit 6 (pages 4799 and 4800 of Record), as follows:

State—33,177,919 or 13.10 per cent whole number ton miles.

Interstate—220,064,905 or 86.90 per cent whole number ton miles.

The passenger miles according to the road's exhibit 7, page 4800 record, are:

State—31,042,395 or 59.32 per cent of whole number.

Interstate—21, 284,235 or 46.68 per cent of whole number.

The State freight earnings of $595,146.09, is 14.69 per cent of the gross earnings of all business in the State.

The State passenger earnings of $724,756.43, is 17.90 per cent of the gross earnings of all business in the State.

With these ascertained and known revenues from both the freight and passenger business in Missouri, and with the amounts definitely known as to each class of business, whether State or interstate, and with the number of ton miles of freight, both State and interstate, known and the per cent each class is of the whole, and with the number of passenger miles known, both State and interstate, and the per cent of each of the whole, we have all the factors as to revenue necessary to a proper consideration of the subject and solution of the problems being submitted. We have called attention to these specific revenues and the classes, state and interstate, and the ton miles and passenger miles and percentages because they will be referred to later, and will be useful in reaching the proper final result.

III.

EXPENSES.

TOTAL EXPENSES OF THE ST. L. & S. F. RAILROAD COMPANY FOR THE THREE MONTHS ENDING SEP. 30, 1907, TOGETHER WITH THE ASSIGNMENT OF THAT PART OF THE EXPENSE CHARGEABLE TO STATE AND INTERSTATE BUSINESS SEPARATELY, TOGETHER WITH AN ASSIGNMENT OF THE EXPENSE CHARGEABLE TO STATE FREIGHT AND STATE PASSENGER BUSINESS SEPARATELY. ALSO AMOUNT OF DIMINUTION OF REVENUE HAD FREIGHT ACTS BEEN IN FORCE.

The third factor necessary is the expense. The total amount of the expenses of the S. L. & S. F. in the transaction of its entire business in Missouri, both State and interstate, for the three months ending September 30, 1907, and as given by the road, itself is, not including taxes and rentals (Exhibit 1), $2,742,794.06.

ASSIGNMENT OF FREIGHT EXPENSE.

Total freight expense undivided between State and interstate. (Exhibit 64, page 4986 and 4987, printed record), not including taxes and rentals, is.....	$1,802,813.26
This total freight expense divided between State and interstate on the basis of ton miles (Exhibit 64), is as follows:	
Expense chargeable to State freight, not including taxes and rentals, is (Exhibit 64, printed record)....	$236,168.61
Expense chargeable to interstate freight is (Exhibit 64, printed record)....	$1,566,644.65

ASSIGNMENT OF PASSENGERS EXPENSE.

Total passenger expense undivided between State and interstate (Exhibit 61, printed record, 4982), is	$974,816.81
Total passenger expense divided between State and interstate on the basis of passenger miles (Exhibit 61), is as follows:	
Expense chargeable to State passenger traffic is (Exhibit 61, printed record), less taxes and rentals..	578,261.38
That part of expense chargeable to interstate passenger traffic is (Exhibit 61, printed record).....	396,555.43

TAXES AND RENTALS.

The amount of taxes and rentals assigned to State freight expense (Exhibit 64, p. 4988, record), is..	$9,295.97
The amount of taxes and rentals assigned to State passesnger expense (Exhibit 61, p. 4984, record), is..	14,558,73

DIMINUTION IN REVENUE HAD FREIGHT LAWS INVOLVED BEEN ENFORCED.

If the freight laws in question had been in force, the diminution in revenue on State freight would have been (Exhibit 64, p. 4988)..	$11,389.27

We now have all the factors necessary to state the problem and work the example. There is no diminution to consider in the passenger fare law, because it was placed in force and the passesnger revenue increased.

IV.

FREIGHT.

STATEMENT AND SOLUTION OF STATE FREIGHT EXAMPLE.

From the given factors the problem as to the net per cent return on State freight traffic is stated as follows:

If that part of the total valuation of the properties of the St. Louis & San Francisco Railroad Company in Missouri, assignable to the State freight traffic, including franchise, is $2,248,980.78, and without the franchise is $1,829,-327.45; and, if the revenue of the road on its State freight traffic for the three months ending September 30, 1907, is $595,146.09, and, if its expense in handling said State freight for that period is as set forth in the following tables; and, if the St. L. & S. F. had obeyed the Missouri freight laws involved, its revenue on State freight for said period would have been reduced $11,389.27, what per cent, would the road have received on its said valuation, both with and without the franchise, had the freight laws involved been in force?

They say, however, there is some evidence to the effect that it costs 30 per cent. more *per ton mile* to handle State freight than it does to handle interstate freight. Very well, we will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $295,300.81 (Vol. V, Exhibit 103, Record 5101-2).

NO. 1.

SOLUTION OF STATE FREIGHT EXAMPLES ON THE BASIS THAT IT COSTS 30 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight		$595,146.09
Expense of handling State freight (Exhibit 64, pp. 4887, Record)	$295,300.81	
Taxes and rentals assignable to State freight	9,275.97	
Total expense		304,576.78
Net profit on State freight		$290,569.31
Diminution in State freight revenue if the freight laws involved had been in force		11,389.27
Net revenue had freight laws involved been in force		$279,180.04
The valuation of that part of the whole properties assigned to State freight, including franchise value, being $2,248,980.78, and the net returns, including the diminution had the freight laws involved been in force, being $279,180.04, then, if said freight laws had been in force, the St. L. & S. F. would have received a net return on said valuation (divide $279,180.04 by $2,248,980.78) of		12.41%
The per cent. of return, less the franchise value assignable to State freight, is (divide $279,180.04 by $1,829,327.45)		15.26%

Thus we see even though we charge State freight with 30 per cent more expense per ton mile than we charge interstate freight, the St. L. & S. F. gets a return of 12.41 per cent on that part of the valuation assigned to State freight, including franchise value, and a return of 15.26 per cent with the franchise value deducted. So with these freight laws involved in force it would receive 12.45 per cent return in the one instance and 15.26 per cent return in the other.

They say, however, there is some evidence to the effect that it costs 50 per cent more *per ton mile* to handle State freight than it does to handle interstate freight. (Judge McPherson found that on the "revenue basis," a different basis to the *ton mile*, it cost 50 per cent more to handle State freight than it did interstate freight, Vol. V. p. 8, page 5310, Record. As State freight rate is two times as much as the interstate rate, Exhibit 36, Vol. II, page 2407, Record, this finding that it cost 50 per cent more is a finding that it costs *three times* as much to handle *State freight as interstate freight* on the revenue basis because the rate in one is *twice* as great as the other, and which is ridiculous and absurd.) We will solve the example, however, on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $332,438.76 (Vol. V, Exhibit 103, Record 5101-2).

NO. 2.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 50 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight.....		$595,146.09
Expense of handling State freight (Exhibit 64, 4987).....	$332,438.76	

Taxes and rentals assignable to State freight.....	9,275.97	
Total expenses.		$341,714.73
Net profit on State freight.....		$253,431.36
Diminution in State freight revenue if the freight laws involved had been in force		11,389.27
Net revenue had freight laws involved been in force.		$242,042.09
The valuation for that part of the whole properties assigned to State freight including franchise value being $2,248.980.78, and the net return including the diminution had the freight laws involved been in force, being $242,042.09, then if said freight laws had been in force the St. L. & S. F. would have received a net return on said valuation (divide $242,042.09 by $2,248,980.78) of.		10.76%
The per cent of return, less the franchise value assignable to State freight is (divide $242,042.09 by $1,829,327.45 being total value less the franchise value assigned to State freight).....		13.23%

So, on the basis of State freight costing 50 per cent more per ton mile to handle than interstate freight gives a return of 10.76 per cent with the franchise value included and 13.23 per cent with franchise value deducted.

V.

PASSENGER.

STATEMENT AND SOLUTION OF STATE PASSENGER EXAMPLE.

From the given factors the problem as to the net per cent return on State passenger traffic is stated as follows:

If that part of the total valuation of the properties of the St. Louis and San Francisco Railroad Company in Missouri, assignable to the State passenger traffic, including franchise is $2,740,419.06, and without the franchise value is $2,229,064.77, and if the revenue of the road on its state passenger traffic for the three months ending September 30, 1907, is $724,756.43, and, if its expense in handling said State passenger traffic for that perod as set forth in the following tables, what per cent did the road receive on its said valuation, both with and without the franchise value?

(The passenger rates were placed in force and there was no diminution of revenue, but on the other hand the State passenger traffic increased under the reduced rate.)

There is evidence to the effect that it costs 10 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $553,208.40. (Vol. V, Exhibit 61.)

NO. 1.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 10 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic.....		$724,756.43
Expense of passenger traffic (Exhibit 61).....	$553,208.40	
Taxes and rentals assignable to passenger traffic.....	14,558.73	
Total expense.		$567,767.13
Net profit on State passenger traffic.....		$156,989.30
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $2,740,419.06, and the net returns being $156,989.30, then the St. L. & San F. received a net return on said valuation (divide $156,989.30 by $2,740,419.06) of.....		5.72%
Upon the valuation, less the franchise value, the St. L. & S. F. received a net return (divide $156,989.30 by $2,229,064.77) of.		7.04%

On the basis that the State passenger traffic costs 10 per cent less per passenger mile than the interstate traffic, the St. L. & S. F. received a net return of 5.72 per cent on that part of the valuation, including franchise value, assigned to State passenger traffic, and received a net return of 7.04 per cent with the franchise value deducted.

There is evidence to the effect that it costs 20 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $524,841.25. (Vol. V, Exhibit 61, Record. p. 4983.)

NO. 2.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 20 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic.....		$724,756.43
Expense of passenger traffic (Exhibit 61, p. 4983, Record).....	$524,841.25	
Taxes and rentals assignable to passenger traffic.....	14,558.73	
Total expense.....		$539,399.98
Net profit on State passenger traffic.....		$185,356.45
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $2,740,419.06, and the net returns being $185,356.45, then the St. L. & S. F. received a net return on said valuation (divide $185.356.45 by $2,740,419.06) of.....		6.76%
Upon the valuation, less the franchise value, the St. Louis & San. F. received a net return (divide $185,356.45 by $2,229,064.77) of.....		8.31%

On the basis that the State passenger traffic cost 20 per cent less per passenger mile than the interstate traffic, the St. L. & S. F. received a net return of 6.76 per cent on that part of the valuation, including franchise value assigned to State passenger traffic, and received a net return of 8.31 per cent with the franchise value deducted.

RECAPITULATION.

The actual working of the problem, both freight and passenger, discloses the fact that the St. L. & S. F. return upon the valuation of the property assigned to State freight on the several cost bases ranges from 12.41 per cent to 10.76 per cent with the franchise value included, and from 15.26 per cent to 13.23 per cent with the franchise value deducted. That the return upon the valuation of the property assigned to State passenger traffic on the several cost bases ranges from 6.96 per cent to 5.72 per cent with the franchise value included, and from 8.31 per cent to 7.04 per cent with the franchise value deducted.

Without further comment at this place we will give a recapitulation of the return in a table below and which speaks for itself in language more forceful than the sophistries of counsel, more forceful than the findings of the court based upon conjecture, and more forceful than the biased opinions of interested witnesses given without any actual knowledge or foundation upon which to base them. These results give us the real truth based upon and worked from the St. L. & S. F. figures in the case.

RECAPITULATION TABLE—FREIGHT RETURNS.

1. Return on valuation, including franchise on basis costs 30 per cent more per ton mile to handle State than interstate freight.....	12.41%
With franchise value deducted.....	15.26%

2. Return on valuation, including franchise on basis costs 50 per cent more per ton mile to handle State than interstate freight..... 10.76¢
With franchise value deducted..... 13.23¢

RECAPITULATION TABLE—PASSENGER RETURNS.

1. Return on valuation, including franchise on basis costs 10 per cent less per passenger mile to handle State traffic..... 5.72¢
With franchise value deducted..... 7.04¢
2. Return on valuation, including franchise on basis costs 20 per cent less per passenger mile to handle State traffic..... 6.76¢
With franchise value deducted..... 8.31¢

From the recapitulation tables we find that the returns to the road upon each and every basis of dividing expenses between State and interstate traffic, upon both freight and passenger laws involved, give adequate and reasonable returns, and even more.

Under the law (174 U. S. 739, supra) the rates, both freight and passenger, in the State and the business of the St. L. & S. F. on those rates must be considered in their entirety.

The revenue upon State freight, as we have seen, is $595,146.09. The revenue upon State passenger traffic is $724,756.43, making the total revenue of both freight and passenger in the State $1,319,902.52. The total valuation of that part of the property assigned to State freight and State passenger traffic, including franchise, is $4,989,399.84, and without the franchise is $4,058,392.22. We shall, therefore, figure the returns upon both the freight and passenger business in the State considered together and upon the three bases upon which the State freight and State passenger traffic was figured.

VI.

STATE FREIGHT AND PASSENGER TRAFFIC CONSIDERED TOGETHER.

We will now figure the two together, as example No. 1 was figured as to each separately; that is to say, on the basis that the expense of handling State freight was 30 per cent more than interstate freight and the cost per passenger mile on State traffic was 10 per cent less than interstate passenger traffic.

NO. 1.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 30 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE, AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS TEN PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and State passenger traffic		$1,319,902.52
Expense of State freight, including taxes and rentals	$304,576.78	
Expense of State passenger traffic, including taxes and rentals	567,767.13	
Total expense		872,343.91
Net profit on State freight and passenger traffic		$447,558.61

Diminution in State freight revenue if the freight laws involved had been in force.....	11,389.27
Net revenue had freight laws involved been in force.....	$436,169.34
The value of the property used for State freight and passenger traffic, including franchise, is $4,989,399.-84. The net returns being $436,-169.34 by making the division gives a net return of.....	8.74%
Upon the valuation, less the franchise, the St. L. & S. F. received a net return (divide $436,169.34 by $4,-058,392.22) of.	10.74%.

On the entire State business on this basis the return is 8.74 per cent with the franchise value included, and 10.74 per cent with the franchise value deducted.

We will now figure the two together, as example No. 2 was figured as to each; that is to say, on the basis that the expense of handling State freight was 50 per cent more than interstate freight, and the cost per passenger mile on State traffic was 20 per cent less than interstate passenger traffic.

NO. 2.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 50 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS 20 PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and State passenger traffic.		$1,319,903.52
Expense of State freight, including taxes and rentals.	$341,714.73	
Expense of State passenger traffic, including taxes and rentals....	539,399.98	
Total expense.....		881,114.71
Net profit on State freight and passenger traffic.		$438,787.81
Diminution in State freight revenue if the freight laws involved had been in force.....		11,389.27
Net revenue had freight laws involved been in force.....		$427,398.54
The value of the property used for State freight and passenger traffic, including franchises being $4,989,399.84, and the net returns being 427,398.54, by making the division, gives net return of.....		8.56%

Upon the valuation less the franchise, the St. L. & S. F. received a net return (divide $427,398.54, by $4,-58,392.22) of. 10.52%

In this example with the franchise included, the return is 8.56 per cent, and with the franchise deducted the return is 10.52 per cent.

So viewing the rate question separately as to freight or separately as to passenger rates, or considering the State business in its entirety in each and every instance, exceptionally reasonable returns have been given to the road. In all these examples we figured the franchise in so as to demonstrate that even when the franchise value was considered the returns were ample. As a matter of law, however, the St. L. & S. F. is not entitled to any returns upon the franchise value. We will now give the final result in the following table, leaving out the returns with the franchise value included:

FINAL RECAPITULATION OF RETURNS—TABLE OF RETURNS ON EACH SEPARATE CLASS, FREIGHT AND PASSENGER, AND WHEN CONSIDERED TOGETHER, FRANCHISE VALUE DEDUCTED.

Return State freight, 30 per cent extra cost basis.	15.26%
Return State passenger, 10 per cent less than interstate cost basis.	7.04%
Return State freight and passenger traffic together.	10.74%
Return State freight, 50 per cent extra cost basis	13.23%
Return State passenger, 20 per cent less than interstate cost basis.	8.31%
Return State freight and passenger traffic together.	10.52%

The Missouri, Kansas & Texas Ry. Company Case.

(No. 690. Knott et al., Apps., v. M., K. & T. Ry. Co.)

NET PER CENT RETURN FIGURED ON ROAD'S OWN STATEMENTS, ETC.

I.

VALUATIONS.

THE TOTAL VALUE OF THE PROPERTIES OF THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY IN MISSOURI, TOGETHER WITH THE SEPARATE AMOUNTS OF THAT PART OF THE VALUATION, ASSIGNABLE TO STATE FREIGHT AND STATE PASSENGER TRAFFIC, AND UPON WHICH SEPARATE VALUES IT IS ENTITLED TO A REASONABLE RETURN. THE COMPANY, HOWEVER, IS NOT ENTITLED TO ANY RETURN UPON THAT PART OF THE VALUATION REPRESENTED BY ITS FRANCHISE.

The first factor which must be known is the reasonable value of the properties of the M., K. & T. used in handling its traffic in Missouri, State and interstate. Having ascertained the fair value of those properties, it must next be ascertained what part of that value is to be assigned to the State passenger traffic and what part is to be assigned to the State freight traffic, to the end we may know upon what amount the company is entitled to a return in each of the acts, passenger and freight, involved and to the end we may know whether or not considering the whole rates and its entire State business, the company is receiving a reasonable return.

The court, on page —— of the printed record, found the value of the properties of the M., K. & T. in Missouri, to be $20,894,229.93, and also found on the same page, that the value per mile was $41,276, and that the number of miles in Missouri was 506.21. The court, in fixing this valuation, fixed exactly the valuation placed upon same by the State Board of Equalization of the State of Missouri

on the theory that the Board aimed to assess at one-third of the value of the properties. In other words, the evidence offered was merely the judgment of the State Board of Equalization. That was not the way to prove and establish the fair value of the properties of the company in Missouri. This value was a matter of affirmative proof which the road could not shift, and from which it could not relieve itself. The judgment of the Board may have been faulty, and it may have reached a valuation for assessment purposes more than one-third. The court cannot accept and receive its judgment for the purposes of this case.

That this was the way in which the proof was made and upon which the court based its finding as to value, we cite the court to pages 5226-5235, printed record. We also call the court's attention to the following on page 1039, printed record:

> "It is agreed between the parties that the basis of the assessment is upon the basis of one-third of the value of the property, in the judgment of the Board."

The following quotation is taken from M., K. & T., Exhibit No. 89, at page 5067, printed record:

> "The assessment of the State Board for 1907—506.21 miles—was $———— per mile, or $6,964,743.31 for the State, at one-third of its actual value. So the State, by action of its taxing board, has practically conceded the total valuation of $20,894,229.93."

Thus, it will be seen that the court has taken as the valuation of the properties to the *very cent three times* the valuation fixed by the State Board of Equalization, and

did so on the strength of the evidence furnished by the records of the State Board of Equalization offered in evidence and upon the theory that the Board had fixed the value at one-third. In other words, the proof of valuation rests solely upon the judgment of the State Board of Equalization in a record written for another purpose, to wit, taxation. Aside from all this, both the complainant and the court adopted the *wrong theory*, as to what constituted proof of the valuation and what were the elements thereof.

The value as found by the court included the franchise value. The assessment of the franchise value made by the State Board (Record V, pp. 5226-5235), of the lines of the M., K. & T. in Missouri, evidence being offered by the road, was $1,403,619.51. This being the sum assessed as the value of the franchise for taxation on a supposed basis of one-third value, this sum must be multiplied by three on the above basis making the franchise value of the properties in the State belonging to the M., K. & T., amount to $4,210,858.53.

The franchise value then is 20.1 per cent of the total valuation of the properties in the State as fixed by the Board of Equalization. When the franchise value is deducted from the value found by the court, it leaves the total valuation of the properties less the franchise, $16,683,371.40. Should this Honorable Court hold the proof as made as to the valuation of the properties was proper and sufficient, then the value upon which the returns should be figured are as follows:

Total valuation, including franchise, of all properties in Missouri of the M., K. & T., same being three times the amount fixed by the State Board of Equalization....	$20,894,229.93
Without franchise	16,683,371.40

Value of that part, including franchise assignable to State freight, is 12.19 per cent of $20,894,229.93, as State freight is 12.19 per cent of the gross earnings of all business, and is (Exhibit 92, supra)..	2,547,006.60
Value without franchise.....	2,033,702.96
Value of that part, including franchise and assignable to State passenger traffic, is 13.07 per cent of $20,894,229.93 as State passenger traffic is 13.07 per cent of the gross earnings of all business (Exhibit 91, Record 5079), and is	2,730,875.85
Value without franchise	2,180,516.64

Inasmuch as the earnings, expenses and net earnings set forth in Exhibits 91 and 92 are those of one-half year only, the valuations shown above must be divided by two in order to arrive at comparable bases for purposes of measuring the return thereon.

This gives us the following table as to the valuation of properties for the purpose of returns:

TABLE OF VALUATIONS.

Total valuation of all properties, including franchise	$10,447,114.96
Total valuation of all properties without franchise	8,341,685.70
Value assignable to State freight, including franchise	1,273,503.30
Value assignable to State freight without franchise	1,016,851.48
Value assignable to State passenger, including franchise	1,365,437.93

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Value assignable to State passenger without franchise	1,090,258.32
Value assignable to both State freight and passenger traffic, including franchise	2,638,941.23
Value assignable to both State freight and passenger traffic without franchise	2,107,109.80

These values as applied to the whole properties and as applied to the State freight traffic and the State passenger traffic, both with and without the franchise value, give us every factor in reference to valuations necessary to solve the problem.

II.

REVENUES.

REVENUE OF MISSOURI, KANSAS & TEXAS RAILWAY COMPANY IN MISSOURI FOR THE MONTHS OF JULY, AUGUST, OCTOBER, NOVEMBER AND DECEMBER, 1907, AND JANUARY, 1908.

The second factor to be ascertained is the total amount of revenue the Missouri, Kansas & Texas Railway Company has received from its business in Missouri, both State and interstate. This is the second step to be taken in solving the mathematical problem.

The total freight earnings in Missouri for the period (Exhibit 92, page 5080, Printed Record), were $1,631,475.15. Full explanation and evidence as to exhibit is found on pages 5065-5082 of record. Of this amount the earnings on the State freight business were $280,964.42, and the earnings on the interstate freight business were $1,350,510.73.

The total passenger earnings in Missouri for the period (Exhibit 92, page 5080, printed record), were $672,041.29, of which amount the earnings on State passenger business were $301,254.30, and the earnings on interstate passenger business were $370,786.99. Explanation of and evidence as to Exhibit 91, is found on pages 5077, record.

Thus, the total passenger and freight revenue received by the M., K. & T. from its entire business, State and interstate in Missouri for the period, was $1,631,475.15 on freight and $672,041.29 on passenger, making a grand total of $2,203,516.44. From the above figures we have then the following table:

REVENUE TABLE.

STATE.

Revenue from State freight.....	$280,964.42
Revenue from State passenger.....	301,254.30
Total revenue State business....	$582,218.72

INTERSTATE.

Revenue from interstate freight.....	$1,350,510.73
Revenue from interstate passenger..	370,786.99
Total revenue interstate business	$1,721,297.72

GRAND TOTAL.

Total revenue State business, freight and passenger	$582,218.72
Total revenue interstate business, freight and passenger	1,721,297.72
Grand total	$2,303,516.44

The ton miles of State and interstate freight are set forth in Exhibit 89, page 5070 of record, as follows:

State—14,769,749, or 11.00 per cent whole number ton miles.

Interstate—125,262,568, or 89.00 per cent whole number ton miles.

The passenger miles, according to the road's Exhibit 89, page 5071, record, is:

State—12,704,228, or 41.56 per cent of whole number.

Interstate—17,863,936, or 58.44 per cent of whole number.

The State freight earnings of $280,964.42, is 12.19 per cent of the gross earnings of all business in the State.

The State passenger earnings of $301,254.30, is 13.07 per cent of the gross earnings of all business in the State.

With these ascertained and known revenues from both the freight and passenger business in Missouri, and with the amounts definitely known as to each class of business, whether State or interstate, and with the number of ton miles of freight, both State and interstate, known and the per cent each class is of the whole, and with the number of passenger miles known, both State and interstate, and the per cent of each of the whole, we have all the factors as to revenue necessary to a proper consideration of the subject and solution of the problems being submitted. We have called attention to these specific revenues and the classes, State and interstate, and the ton miles and passenger miles and percentages, because they will be referred to later, and will be useful in reaching the proper final result.

III.

EXPENSES.

TOTAL EXPENSES OF THE M., K. & T. RAILWAY COMPANY FOR PERIOD, TOGETHER WITH THE ASSIGNMENT OF THAT PART OF THE EXPENSE CHARGEABLE TO STATE AND INTERSTATE BUSINESS SEPARATELY, TOGETHER WITH AN ASSIGNMENT OF THE EXPENSE CHARGEABLE TO STATE FREIGHT AND STATE PASSENGER BUSINESS SEPARATELY. ALSO AMOUNT OF DIMINUTION OF REVENUE HAD FREIGHT ACTS BEEN IN FORCE.

The third actor necessary is the expense. The total amount of the expenses of the M., K. & T. in the transaction of its entire business in Missouri, both State and interstate, for the period, and as given by the road itself is, not including taxes and rentals (Exhibit ——), $1,527,684.53.

ASSIGNMENT OF FREIGHT EXPENSE.

Total freight expense undivided between State and interstate less taxes, rentals, etc. (Exhibit 89, page 5066, printed record), not including taxes and rentals, is..	$1,010,643.55
This total freight expense divided between State and interstate on the basis of ton miles (Exhibit 92), is as follows:	
Expense chargeable to State freight, not including taxes and rentals, is (Exhibit 92, printed record)..	$111,170.78

Expense chargeable to interstate freight is (Exhibit 92, printed record)	899,472.77

ASSIGNMENT OF PASSENGER EXPENSE.

Total passenger expense undivided between State and interstate (Exhibit 91, printed record, 5077) is	$516,589.98
Total passenger expense divided between State and interstate on the basis of passenger miles (Exhibit 91), is as follows:	
Expense chargeable to State passenger traffic is (Exhibit 91, printed record)	214,694.80
That part of expense chargeable to interstate passenger traffic is (Exhibit 91, printed record)	301,895.18

TAXES.

The amount of taxes assigned to State freight expense (Exhibit 91, p. 5081, record), is	$13,091.97
The amount of taxes assigned to State passenger expense (Exhibit 91, p. 5079, record), is	24,298.26

DIMINUTION IN REVENUE HAD FREIGHT LAWS INVOLVED BEEN ENFORCED.

If the freight laws in question had been in force, the diminution in revenue on State freight would have been (Exhibit 92, p. 5081 and p. ——, record, explaining the exhibit)	$20,222.86

We now have all the factors necessary to state the problem and work the example. There is no diminution to consider in the passenger fare law, because it was placed in force and the passenger revenue increased.

IV.

FREIGHT.

STATEMENT AND SOLUTION OF STATE FREIGHT EXAMPLE.

From the given factors the problem as to the net per cent return on State freight traffic is stated as follows:

If that part of the total valuation of the properties of the Missouri, Kansas & Texas Railway Company in Missouri, assignable to the State freight traffic, including franchise, is $1,273,503.30, and without the franchise is $1,016,851.48, and, if the revenue of the road on its State freight traffic for the period is $280,964.42; and, if its expense in handling said State freight for that year is as set forth in the following tables; and, if the M., K. & T. had obeyed the Missouri freight laws involved, its revenue on State freight for said period would have been reduced $20,222.86; what per cent. would the road have received on its said valuation, both with and without the franchise, had the freight laws involved been in force?

They say, however, there is some evidence to the effect that it costs 30 pr cent more *per ton mile* to handle State freight than it does to handle interstate freight. Very well, we will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $139,873.07 (Vol. V, Exhibit 92, Record 5081).

NO. 1.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 30 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight.....		$280,964.42
Expense of handling State freight (Exhibit 92, pp. 5081, Record)	$139,873.07	
Taxes and rentals assignable to State freight	13,091.97	
Total expense		152,965.04
Net profit on State freight.....		$127,999.38
Diminution in State freight revenue if the freight laws involved had been in force		20,222.86
Net revenue had freight laws involved been in force		$107,776.52
The valuation of that part of the whole properties assigned to State freight, including franchise value, being $1,273,503.30, and the net returns, including the diminution had the freight laws involved been in force, being $107,776.52, then, if said freight laws had been in force, the M., K. & T. would have received a net return on said valuation (divide $107,776.52 by $1,273,503.30) of		8.46%
The per cent. of return, less the franchise value assignable to State freight, is (divide $107,776.52 by $1,016,851.48).		10.59%

Thus we see even though we charge State freight with 30 per cent more expense per ton mile than we charge interstate freight, the M., K. & T. gets a return of 8.46 per cent on that part of the valuation assigned to State freight, including franchise value, and a return of 10.59 per cent with the franchise value deducted. So with these freight laws involved in force it would receive 8.46 per cent return in the one instance and 10.59 per cent return in the other.

They say, however, there is some evidence to the effect that it costs 50 per cent more *per ton mile* to handle State freight than it does to handle interstate freight. (Judge McPherson found that on the "revenue basis," a different basis to the *ton mile*, it cost 50 per cent more to handle State freight than it did interstate freight, Vol. V, p. 8, page 5310, Record. As State freight rate is two times as much as the interstate rate, Exhibit 36, Vol. II, page 2407, Record, this finding that it costs 50 per cent more is a finding that it costs *three times* as much to handle *State freight as interstate freight* on the revenue basis because the rate in one is *twice* as great as the other, and which is ridiculous and absurd.) We will solve the example, however, on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $158,064.65 (Vol. V, Exhibit 92, Record 5081).

NO. 2.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 50 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight.....		$280,964.42
Expense of handling State freight (Exhibit 92, pp. 5081, Record	$158,064.65	

Taxes and rentals assignable to State freight	13,091.97	
Total expenses		$171,156.62
Net profit on State freight.....		$109,807.80
Diminution in State freight revenue if the freight laws involved had been in force		20,222.86
Net revenue had freight laws involved been in force		$89,584.94
The valuation for that part of the whole properties assigned to State freight including franchise value being $1,273,503.30, and the net return including the diminution had the freight laws involved been in force, being $89,584.94, then if said freight laws had been in force the M., K. & T. would have received a net return on said valuation (divide $89,584.94 by $1,273,503.30) of		7.03%
The per cent of return, less the franchise value assignable to State freight is (divide $89,584.94 by $1,016,851.48, being total value less the franchise value assigned to State freight).....		8.81%

So, on the basis of State freight costing 50 per cent more per ton per mile to handle than interstate freight gives a return of 7.03 per cent with the franchise value included and 8.81 per cent with franchise value deducted.

V.

PASSENGER.

STATEMENT AND SOLUTION OF STATE PASSENGER EXAMPLE.

From the given factors the problem as to the net per cent return on State passenger traffic is stated as follows:

If that part of the total valuation of the properties of the Missouri, Kansas & Texas Railway Company in Missouri, assignable to the State passenger traffic, including franchise, is $1,365,437.93, and without the franchise value is $1,090,-258.32; and, if the revenue of the road on its State passenger traffic for the period, is $301,254.30; and, if its expense in handling said State passenger traffic for the year is as set forth in the following tables, what per cent did the road receive on its said valuation, both with and without the franchise value?

(The passenger rates were placed in force and there was no diminution of revenue, but on the other hand the State passenger traffic increased under the reduced rate.

There is evidence to the effect that it costs 10 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $201,-573.41 (Vol. V, Exhibit 91, Record, p. 5078.)

NO. 1.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 10 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic.....		$301,254.30
Expense of passenger traffic (Exhibit 91, p. 5078 Record).	$201,573.41	
Taxes and rentals assignable to passenger traffic.....	24,298.26	
Total expense		$225,871.67
Net profit on State passenger traffic.....		$75,382.63
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $1,365,437.93, and the net returns being $75,382.63, then the M., K. & T. received a net return on said valuation (divide $75,382.63 by $1,365,457.93) of		5.52%
Upon the valuation, less the franchise value, the M., K. & T. received a net return (divide $75,382.63 by $1,090,258.32) of		6.91%

On the basis that the State passenger traffic costs ten per cent less per passenger mile than the interstate traffic, the M., K. & T. received a net return of 5.52 per cent on that part of the valuation, including franchise value, assigned to State passenger traffic, and received a net return of 6.91 per cent with the franchise value deducted.

There is evidence to the effect that it costs 20 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $187,315.53. (Vol. V, Exhibit 91, Record, p. 5048.)

NO. 2.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 20 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic.....		$301,254.30
Expense of passenger traffic (Exhibit 91, p. 5078, Record).	$187,315.53	
Taxes and rentals assignable to passenger traffic	24,298.26	
Total expense		$211,613.79
Net profit on State passenger traffic.....		$89,640.51
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $1,365,437.93, and the net returns being $89,640.51, then the M., K. & T. received a net return on said valuation (divide $89,640.51 by $1,265,437.93) of.....		6.56%
Upon the valuation, less the franchise value, the M., K. & T. received a net return (divide $89,640.51 by $1,090,258.32) of		8.22%

On the basis that the State passenger traffic costs 20 per cent less per passenger mile than the interstate traffic, the M., K. & T. received a net return of 6.56 per cent on that part of the valuation, including franchise value assigned to State passenger traffic, and received a net return of 8.22 per cent with the franchise value deducted.

RECAPITULATION.

The actual working of the problem, both freight and passenger, discloses the fact that the M., K. & T.'s return upon the valuation of the property assigned to State freight on the several cost bases ranges from 7.03 per cent to 8.46 per cent with the franchise value included, and from 8.81 per cent to 10.59 per cent with the franchise value deducted. That the return upon the valuation of the property assigned to State passenger traffic on the several cost bases ranges from 5.52 per cent to 6.56 per cent with the franchise value included, and from 6.91 per cent to 8.22 per cent with the franchise value deducted.

Without further comment at this place we will give a recapitulation of the return in a table below and which speaks for itself in language more forceful than the sophistries of counsel, more forceful than the findings of the court based upon conjecture, and more forceful than the biased opinions of interested witnesses given without any actual knowledge or foundation upon which to base them. These results give us the real truth based upon and worked from the M., K. & T's figures in the case.

RECAPITULATION TABLE—FREIGHT RETURNS.

1. Return on valuation, including franchise on basis costs 30 per cent more per ton mile to handle State than interstate freight..... 8.46%
   With franchise deducted..... 10.59%

2. Return on valuation, including franchise on basis costs 50 per cent more per ton mile to handle State than interstate freight..... 7.03%
With franchise value deducted..... 8.81%

RECAPITULATION TABLE—PASSENGER RETURNS.

1. Return on valuation, including franchise on basis costs 10 per cent less per passenger mile to handle State traffic..... 5.52%
With franchise value deducted..... 6.91%
2. Return on valuation, including franchise on basis costs 20 per cent less per passenger mile to handle State traffic..... 6.56%
With franchise value deducted..... 8.22%

From the recapitulation tables we find that the returns to the road upon each and every basis of dividing expenses between State and interstate traffic, upon both freight and passenger laws involved, give adequate and reasonable returns, and even more.

Under the law (174 U. S. 739, supra) the rates, both freight and passenger, in the State and the business of the M., K. & T. on those rates must be considered in their entirety.

The revenue upon State freight, as we have seen, is $280,964.42. The revenue upon State passenger traffic is $301,254.30, making the total revenue of both freight and passenger in the State $582,218.72. The total valuation of that part of the property assigned to State freight and State passenger traffic, including franchise, is $2,638,941.23, and without the franchise is $2,107,109.80. We shall, therefore, figure the returns upon both the freight and passenger business in the State considered together and upon the two bases upon which the State freight and State passenger traffic was figured.

VI.

STATE FREIGHT AND PASSENGER TRAFFIC CONSIDERED TOGETHER.

We will now figure the two together, as example No. 1 was figured as to each separately; that is to say, on the basis that the expense of handling State freight was 30 per cent more than interstate freight and the cost per passenger mile on State traffic was 10 per cent less than interstate passenger traffic.

NO. 1.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 30 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS 10 PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and passenger traffic		$582,218.72
Expense of State freight, including taxes and rentals	$152,965.04	

Expense of State passenger traffic, including taxes and rentals	225,871.67	
Total expense		$378,836.71
Net profit on State freight and passenger traffic		203,382.01
Diminution in State freight revenue if the freight laws involved had been in force		20,222.86
Net revenue had freight laws involved been in force		$183,159.15
The value of the property used for State freight and passenger traffic, including franchise, is $2,638,941.23. The net returns being $183,159.15, by making the division gives a net return of		6.94%
Upon the valuation, less the franchise, the M., K. & T. received a net return (divide $183,159,15 by $2,107,109.80) of		8.69%

On the entire State business on this basis the return is 6.94 per cent with the franchise value included, and 8.69 per cent with the franchise value deducted.

We will now figure the two together, as example No. 2 was figured as to each; that is to say, on the basis that the expense of handling State freight was 50 per cent more than interstate freight, and the cost per passenger mile on State traffic was 20 per cent less than interstate passenger traffic.

NO. 2.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 50 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS 20 PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and State passenger traffic		$582,218.72
Expense of State freight, including taxes and rentals	$171,156.62	
Expense of State passenger traffic, including taxes and rentals	211,613.79	
Total expense		$382,770.41
Net profit on State freight and passenger traffic		$199,448.31
Diminution in State freight revenue if the freight laws involved had been in force		20,222.86
Net revenue had freight laws involved been in force		$179,225.45
The value of the property used for State freight and passenger traffic, including franchises, being $2,638,941.23, and the net returns being $179,225.45 by making the division, gives net return of		6.79%
Upon the valuation less the franchise, the M., K. & T. received a net return (divide $179,225.45, by $2,107,109.80), of		8.50%

In this example with the franchise included, the return is 6.79 per cent, and with the franchise deducted the return is 8.50 per cent.

So viewing the rate question separately as to freight or separately as to passenger rates, or considering the State business in its entirety in each and every instance, exceptionally reasonable returns have been given to the road. In all these examples we figured the franchise in so as to demonstrate that even when the franchise value was considered the returns were ample. As a matter of law, however, the M., K. & T. is not entitled to any returns upon the franchise value. We will now give the final result in the following table, leaving out the returns with the franchise value included:

FINAL RECAPITULATION OF RETURNS—TABLE OF RETURNS ON EACH SEPARATE CLASS, FREIGHT AND PASSENGER, AND WHEN CONSIDERED TOGETHER, FRANCHISE VALUE DEDUCTED.

Return State freight, 30 per cent extra cost basis.	10.59%
Return State passenger, 10 per cent less than interstate cost basis	6.91%
Return State freight and passenger traffic together	8.69%
Return State freight, 50 per cent extra cost basis	8.81%
Return State passenger, 20 per cent less than interstate cost basis.....	8.22%
Return State freight and passenger traffic together	8.50%

The Chicago, Rock Island and Pacific Ry. Co. Case.

(No. 678, Knott et al. App. v. C., R. I. & Pac. Ry. Co.)

NET PER CENT RETURN FIGURED ON ROAD'S OWN STATEMENTS, ETC.

I.

VALUATIONS.

THE TOTAL VALUE OF THE PROPERTIES OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY IN MISSOURI, TOGETHER WITH THE SEPARATE AMOUNTS OF THAT PART OF THE VALUATION, ASSIGNABLE TO STATE FREIGHT AND STATE PASSENGER TRAFFIC, AND UPON WHICH SEPARATE VALUES IT IS ENTITLED TO A REASONABLE RETURN. THE COMPANY, HOWEVER, IS NOT ENTITLED TO ANY RETURN UPON THAT PART OF THE VALUATION REPRESENTED BY ITS FRANCHISE.

The first factor which must be known is the reasonable value of the properties of the Rock Island used in handling its traffic in Missouri, State and interstate. Having ascertained the fair value of those properties, it must next be ascertained what part of that value is to be assigned to the State passenger traffic and what part is to be assigned to the State freight traffic, to the end we may know upon what amount the company is entitled to a return in each of the acts, passenger and freight, involved and to the end we may know whether or not considering the whole rates and its entire State business, the company is receiving a reasonable return.

The court, on page 5311 of the printed record, found the value of the properties of the Rock Island in Missouri, to be $19,102,507.59, and also found on the same page, that the value per mile was $37,058.00, and that the number of miles in Missouri was 515.48. The court, in fixing this valuation, fixed exactly the valuation placed upon same by the State Board of Equalization of the State of Missouri on the theory that the Board aimed to assess at one-third of the value of the properties. In other words, the evidence offered was

merely the judgment of the State Board of Equalization. That was not the way to prove and establish the fair value of the properties of the company in Missouri. This value was a matter of affirmative proof which the road could not shift and from which it could not relieve itself. The judgment of the Board may have been faulty and it may have reached a valuation for assessment purposes more than one-third. The court cannot accept and receive its judgment for the purposes of this case.

That this was the way in which the proof was made and upon which the court based its finding as to value, we cite the court to pages 5169-5177, printed record. We also call the court's attention to the following on page 1039, printed record:

> "It is agreed between the parties that the basis of the assessment is upon the basis of one-third of the value of the property, in the judgment of the Baord."

The following quotation is taken from Rock Island, exhibit No. 78, at page 5030, printed record:

> "The value fixed by the State Board of Equalization shows the rate to be confiscatory. The assessment for 1907, was $6,367,502.53, and this was as will be conceded by the State upon one-third of the value as determined by that body. This makes a valuation of $19,102,507.59.

Thus, it will be seen that the court has taken as the valuation of the properties to the *very cent three times* the valuation fixed by the State Board of Equalization, and did so on the strength of the evidence furnished by the records of the State Board of Equalization offered in evidence and upon the

theory that the Board had fixed the value at one-third. In other words, the proof of valuation rests solely upon the judgment of the State Board of Equalization in a record written for another purpose, to wit, taxation. Aside from all this, both the complainant and the court adopted the *wrong theory*, as to what constituted proof of the valuation and what were the elements thereof.

The value as found by the court included the franchise value. The assessment of the franchise value made by the State Board (Record V., pp. 5169-5177), of the lines of the Rock Island in Missouri, evidence being offered by the road, was $1,286,200.76. This being the sum assessed as the value of the franchise for taxation on a supposed basis of one-third value, this sum must be multiplied by three on the above basis making the franchise value of the properties in the State belonging to the Rock Island, amount to $3,858,602.28.

The franchise value then is 20.2 per cent of the total valuation of the properties in the State as fixed by the Board of Equalization. When the franchise value is deducted from the value found by the court, it leaves the total valuation of the properties less the franchise, $15,243,905.31. Should this Honorable Court hold the proof as made as to the valuation of the properties was proper and sufficient, then, the value upon which the returns should be figured are as follows:

Total valuation, including franchise, of all properties in Missouri of the Rock Island, same being three times the amount fixed by the State Board of Equalization (Exhibit 80, p. 5040, Record).....	$19,102,507.59
Without franchise.....	15,243,905.31

Value of that part including franchise assignable to State freight is 13.95 per cent of $19,102,507.59, as State freight is 13.95 per cent of the gross earnings of all business, and is (Exhibit 81, supra).....	$2,664,799.81
Value without franchise.....	2,125,000.40
Value of that part including franchise and assignable to State passenger traffic is 12.36 per cent of $19,102,-507.59 as State passenger traffic is 12.36 per cent of the gross earnings of all business (Exhibit 80,-Record 5040), and is.....	2,361,069.94
Value without franchise.....	1,884,146.68

Inasmuch as the earnings, expenses and net earnings set forth in exhibits 80 and 81 are those of one-fourth year only the valuation shown above must be divided by four in order to arrive comparable basis for purposes of measuring the return thereon.

This gives us the following table as to the valuation of properties for the purpose of returns:

TABLE OF VALUATIONS.

Total valuation of all properties including franchise.....	$4,778,126.89
Total valuation of all properties without franchise.....	3,810,976.33
Value assignable to State freight, including franchise.....	666,199.95
Value assignable to State freight without franchise.....	531,250.10

Value assignable to State passenger, including franchise.	590,267,49
Value assignable to State passenger without franchise.	471,036.67
Value assignable to both State freight and passenger traffic, including franchise.	1,256,467.44
Value assignable to both State freight and passenger traffic without franchise.	$1,002,286.77

These values as applied to the whole properties and as applied to the State freight traffic and the State passenger traffic, both with and without the franchise value, give us every factor in reference to valuations necessary to solve the problem.

II.

REVENUES.

REVENUE OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY IN MISSOURI FOR THE THREE MONTHS ENDING SEPTEMBER 30, 1907.

The second factor to be ascertained is the total amount of revenue the Chicago, Rock Island & Pacific Railway has received from its business in Missouri, both State and interstate. This is the second step to be taken in solving the mathematical problem.

The total freight earnings in Missouri for the three months ending September 30, 1907 (Exhibit 81, page 5041, Printed Record), were $839,997.54. Full explanation and evidence as to exhibit is found on pages 5026-5042 of record. Of this amount the earnings on the State freight business were $154,989.59, and the earnings on interstate freight business were $683,007.95.

The total passenger earnings in Missouri for the three months ending September 30, 1907 (Exhibit 80, page 5038, printed record), were $273,357.33, of which amount the earnings on State passenger business were $137,473.52, and the earnings on interstate passenger business were $135,883.81. Explanation of and evidence as to exhibit 80, is found on pages 5026-5042, record.

Thus, the total passenger and freight revenue received by the Rock Island from its entire business, State and interstate in Missouri for the three months ending September 30, 1907, was $837,997.54 on freight and $273,357.33 on passenger, making a grand total of $1,111,354.87. From the above figures we have then the following table:

REVENUE TABLE.

STATE.

Revenue from State freight.....	$154,989.59
Revenue from State passenger.....	137,473.52
Total revenue State business.....	$292,463,11

INTERSTATE.

Revenue from interstate freight.....	$683,007.95
Revenue from interstate passenger....	135,883.81
Total revenue interstate business.....	$818,891.76

GRAND TOTAL.

Total revenue State business, freight and passenger.....	$292,463.11
Total revenue interstate business, freight and passenger.....	818,891.76
Grand total.....	$1,111,354.87

The ton miles of State and interstate freight are set forth in Exhibit 81, page 5043 of Record, as follows:

State—7,243,048 or 7.61 per cent whole number ton miles.

Interstate—87,903,216 or 92.39 per cent whole number ton miles.

The passenger miles according to the road's exhibit 80, page 5040 record is:

State—5,865,914 or 44.28 per cent of whole number.

Interstate—7,381,578 or 55.72 per cent of whole number.

The State freight earnings of $154,989.59, is 13.95 per cent of the gross earnings of all business in the State.

The State passenger earnings of $137,473.52, is 12.36 per cent of the gross earnings of all business in the State.

With these ascertained and known revenues from both the freight and passenger business in Missouri, and with the amounts definitely known as to each class of business, whether State or interstate, and with the number of ton miles of freight, both State and interstate, known and the per cent each class is of the whole, and with the number of passenger miles known, both State and interstate, and the per cent of each of the whole, we have all the factors as to revenue necessary to a proper consideration of the subject and solution of the problems being submitted. We have called attention to these specific revenues and the classes, State and interstate, and the ton miles and passenger miles and percentages because they will be referred to later, and will be useful in reaching the proper final result.

III.

EXPENSES.

TOTAL EXPENSES OF THE C., R. I. & P. RAILWAY COMPANY FOR THE THREE MONTHS ENDING SEPT. 30, 1907, TOGETHER WITH THE ASSIGNMENT OF THAT PART OF THE EXPENSE CHARGEABLE TO STATE AND INTERSTATE BUSINESS SEPARATELY, TOGETHER WITH AN ASSIGNMENT OF THE EXPENSE CHARGEABLE TO STATE FREIGHT AND STATE PASSENGER BUSINESS SEPARATELY. ALSO AMOUNT OF DIMINUTION OF REVENUE HAD FREIGHT ACTS BEEN IN FORCE.

The third factor necessary is the expense. The total amount of the expenses of the Rock Island in the transaction of its entire business in Missouri, both State and interstate, for the three months ending September 30, 1907, and as given by the road itself, is, not including taxes and rentals (Exhibit 78), $936,833.35.

ASSIGNMENT OF FREIGHT EXPENSE.

Total freight expense undivided between State and interstate less rentals, etc. (Exhibit 81, page 5041, printed record), not including taxes and rentals, is.....	$619,199.73
This total freight expense divided between State and interstate on the basis of ton miles (Exhibit 81), is as follows:	

Expense chargeable to State freight, not including taxes and rentals, is (Exhibit 81, printed record).....	$43,773.10
Expense chargeable to interstate freight is (Exhibit 81, printed record).....	575,426.63

ASSIGNMENT OF PASSENGER EXPENSE.

Total passenger expense undivided between State and interstate (Exhibit 78, printed record, 5027), is.....	$317,633.62
Total passenger expense divided between State and interstate on the basis of passenger miles (Exhibit 80), is as follows:	
Expense chargeable to State passenger traffic is (Exhibit 80, printed record)..	140,648.16
That part of expense chargeable to interstate passenger traffic is (Exhibit 80, printed record).....	176,985.46

TAXES AND RENTALS.

The amount of taxes and rentals assigned to State freight expense (Exhibit 81, p. 5042, record), is.....	$5,648.70
The amount of taxes and rentals assigned to State passenger expense (Exhibit 80, p. 5040, record), is.....	9,305.63

DIMINUTION IN REVENUE HAD FREIGHT LAWS INVOLVED BEEN ENFORCED.

If the freight laws in question had been in force, the diminution in revenue on State freight would have been (Exhibit 81, p. 5042).....	$9,989.43

We now have all the factors necessary to state the problem and work the example. There is no diminution to consider in the passenger fare law, because it was placed in force and the passenger revenue increased.

IV.

FREIGHT.

STATEMENT AND SOLUTION OF STATE FREIGHT EXAMPLE.

From the given factors the problem as to the net per cent return on State freight traffic is stated as follows:

If that part of the total valuation of the properties of the Chicago, Rock Island & Pacific Railway Company in Missouri, assignable to the State freight traffic, including franchise, is $666,199.95, and without the franchise is $531,250.10; and, if the revenue of the road on its State freight traffic for the three months ending September 30, 1907, is $154,-989.59; and, if its expense in handling said State freight for that year is as set forth in the following tables; and, if the Rock Island had obeyed the Missouri freight laws involved, its revenue on State freight for said period would have been reduced $9,989.43; what per cent. would the road have received on its said valuation, both with and without the franchise, had the freight laws involved been in force?

They say, however, there is some evidence to the effect that it costs 30 per cent. more *per ton mile* to handle State freight than it does to handle interstate freight. Very well, we will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $59,876.61 (Vol. V, Exhibit 81, Record 5042).

NO. 1.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 30 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight.....		$154,989.59
Expense of handling State freight (Exhibit 80, p. 5042 Record)	$59,876.61	
Taxes assignable to State freight	5,648.70	
Total expense		$65,525.31
Net profit on State freight		$89,464.28
Diminution in State freight revenue if the freight laws involved hadbeen in force		9,989.43
Net revenue had freight laws involved been in force.		$79,474.85
The valuation of that part of the whole properties assigned to State freight, including franchise value, being $666,199.95, and the net returns, including the diminution had the freight laws involved been in force, being $79,474.85, then, if said freight laws had been in force, the Rock Island would have received a net return on said valuation (divide $79,474.85 by $666,199.95) of.		11.93% .
The per cent of return, less the franchise value assignable to State freight, is (divide $79,474.85 by $531,250.10)....		14.96%

Thus we see even though we charge State freight with 30 per cent more expense per ton mile than we charge interstate freight, the Rock Island gets a return of 11.93 per cent on that part of the valuation assigned to State freight, including franchise value, and a return of 14.96 per cent with the franchise value deducted. So with these freight laws involved in force it would receive 11.93 per cent return in the one instance and 14.96 per cent return in the other.

They say, however, there is some evidence to the effect that it costs 50 per cent more *per ton mile* to handle State freight than it does to handle interstate freight. (Judge McPherson found that on the "revenue basis," a different basis to the *ton mile*, it cost 50 per cent more to handle State freight than it did interstate freight, Vol. V, p. 8, page 5310, Record. As State freight rate is two times as much as the interstate rate, Exhibit 36, Vol. II, page 2407, Record, this finding that it costs 50 per cent more is a finding that it costs *three times* as much to handle *State freight as interstate freight* on the revenue basis because the rate in one is *twice* as great as the other, and which is ridiculous and absurd.) We will solve the example, however, on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $68,111.97 (Vol. V, Exhibit 81, Record 5042).

NO. 2.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 50 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight.....		$154,989.59
Expense of handling State freight (Exhibit 81, p. 5042, Record).....	$68,111.97	

Taxes and rentals assignable to State freight.....	5,648.70	
Total expenses		$73,760.67
Net profit on State freight.....		$81,228.92
Diminution in State freight revenue if the freight laws involved had been in force		9,989.43
Net revenue had freight laws involved been in force		$71,239.49
The valuation for that part of the whole properties assigned to State freight, including franchise value being $666,199.95, and the net returns including the diminution had the freight laws been involved been in force, being 71,239.49, then, if said freight laws had been in force the Rock Island would have received a net return on said valuation (divide $71,239.49 by $666,199.95) of		10.69%
The per cent of return, less the franchise value assignable to State freight is (divide $71,239.49 by $531,250.10, being total value less the franchise value assigned to State freight).....		13.41%

So, on the basis of State freight costing 50 per cent more per ton per mile to handle than interstate freight gives a return of 10.69 per cent with the franchise value included and 13.41 per cent with franchise value deducted.

V.

PASSENGER.

STATEMENT AND SOLUTION OF STATE PASSENGER EXAMPLE.

From the factors given the problem as to the net per cent return on State passenger traffic is stated as follows:

If that part of the total valuation of the properties of the Chicago, Rock Island & Pacific Railway Company in Missouri, assignable to the State passenger traffic, including franchise, is $590,267.49, and without the franchise value is $471,036.67; and, if the revenue of the road on its State passenger traffic for the three months ending September 30, 1907, is $137,473.52; and, if its expense in handling said State passenger traffic for that period is, as set forth in the following tables, what per cent did the road receive on its said valuation, both with and without the franchise value?

(The passenger rates were placed in force and there was no diminution of revenue, but on the other hand the State passenger traffic increased under the reduced rate.)

There is evidence to the effect that it costs 10 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $132,421.46. (Vol. V, Exhibit 80, Record, p. 5039.)

NO. 1.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 10 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic.....		$137,473.52
Expense of passngr traffic (Exhibit 80, p. 5038, Record	$132,421.46	
Taxes and rentals assignable to passenger traffic	9,305.63	
Total expense		$141,727.09
Net profit on State passenger traffic.....		$4,253.57
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $590,267.49, and the net returns being $4,253.57, then the Rock Island received a net return on said valuation (divide $4,253.57 by $590,267.49), of.....		.75%
Upon the valuation, less the franchise value, the Rock Island received a net return (divide $4,253.57 by $471,036.67), of..		.90%

On the basis that the State passenger traffic costs 10 per cent less per passenger mile than the interstate traffic, the Rock Island received a net return of .75 per cent on that part of the valuation, including franchise value, assigned to State passenger traffic, and received a net return of .90 per cent with the franchise value deducted.

There is evidence to the effect that it costs 20 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $123,-432.42. (Vol. V. Exhibit 80, Record, p. 5039.)

NO. 2.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 20 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic.....		$137,473.52
Expense of passenger traffic (Exhibit 80, p. 5038, Record)	$123,432.42	
Taxes and rentals assignable to passenger traffic	9,305.63	
Total expense		$132,738.05
Net profit on State passenger traffic.....		$4,735.47
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $590,267.47, and the net returns being 4,735.47, then the Rock Island received a net return on said valuation (divide $4,735.47 by $590,267.49), of.		.80%
Upon the valuation, less the franchise value, the Rock Island received a net return (divide $4,735.47 by $471,036.67), of..		1.01%

On the basis that the State passenger traffic cost 20 per cent less per passenger mile than the interstate traffic, the

Rock Island received a net return of .80 per cent on that part of the valuation, including franchise value assigned to State passenger traffic, and received a net return of 1.01 per cent with the franchise value deducted.

RECAPITULATION.

The actual working of the problem, both freight and passenger, discloses the fact that the Rock Island's return upon the valuation of the property assigned to State freight on the several cost basis ranges from 10.69 per cent to 11.93 per cent with the franchise value included, and from 13.41 per cent to 14.96 per cent with the franchise value deducted. That the return upon the valuation of the property assigned to State passenger traffic on the several cost basis ranges from .75 per cent to .80 per cent with the franchise value included, and from .90 per cent to 1.01 per cent with the franchise value deducted.

Without further comment at this place we will give a recapitulation of the return in a table below and which speaks for itself in language more forceful than the sophistries of counsel, more forceful than the findings of the court based upon conjecture, and more forceful than the biased opinions of interested witnesses given without any actual knowledge or foundation upon which to base them. These results give us the real truth based upon and worked from the Rock Island's figures in the case.

RECAPITULATION TABLE—FREIGHT RETURNS.

1. Return on valuation, including franchise on basis costs 30 per cent more per ton mile to handle State than interstate freight..... 11.93%

With franchise value deducted..... 14.96%

2. Return on valuation, including franchise on basis costs 50 per cent more per ton mile to handle State than interstate freight..... 10.69%
With franchise value deducted.....13.41%

RECAPITULATION TABLE—PASSENGER RETURNS.

1. Return on valuation, icluding franchise on basis costs 10 per cent less per passenger mile to handle State traffic..... .75%
With franchise value deducted..... .90%
2. Return on valuation, including franchise on basis costs 20 per cent less per passenger mile to handle State traffic..... .80%
With franchise value deducted..... 1.01%

Under the law (174 U. S. 739, supra), the rates, both freight and passenger, in the State and the business of the Rock Island on those rates must be considered in their entirety.

The revenue upon State freight, as we have seen, is $154,989.59. The revenue upon State passenger traffic is $137,473.52, making the total revenue of both freight and passenger in the State $292,463,11. The total valuation of that part of the property assigned to State freight and State passenger traffic, including franchise, $1,256,467.44, and without the franchise is $1,002,286.77. We shall, therefore, figure the returns upon both the freight and passenger business in the State considered together and upon the two bases upon which the State freight and State passenger traffic were figured.

VI.

STATE FREIGHT AND PASSENGER TRAFFIC CONSIDERED TOGETHER.

We will now figure the two together, as example No. 1 was figured as to each separately; that is to say, on the basis that the expense of handling State freight was 30 per cent more than interstate freight and the cost per passenger mile on State traffic was 10 per cent less than interstate passenger traffic.

NO. 1.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 30 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS 10 PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from Sate freight and State passenger traffic		$292,463.11
Expense of State freight, including taxes and rentals	$65,525.31	
Expense of State passenger traffic, including taxes and rentals	141,727.09	
Total expense		$207,252.40
Net profit on State freight and passenger traffic		$85,210.71
Diminution in State freight revenue if the freight laws involved had been in force.		9,989.43

Net revenue had freight laws involved been in force		$75,221.28
The value of the property used for State freight and passenger traffic, including franchise, is $1,256,467.44. The net returns being $75,221.28, by making the division gives a net return of.....		5.98%
Upon the valuation, less the franchise, the Rock Island received a net return (divide $75,221.28 by $1,002,[illegible]7), of.		7.50%

On the entire State business on this basis the return is 5.98 per cent with the franchise value included, and 7.50 per cent with the franchise value deducted.

We will now figure the two together, as example No. 2 was figured as to each; that is to say, on the basis that the expense of handling State freight was 50 per cent more than interstate freight, and the cost per passenger mile on State traffic was 20 per cent less than interstate passenger traffic.

NO. 2.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 50 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS 20 PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and State passenger traffic		$292,463.11
Expense of State freight, including taxes and rentals	$73,760.67	

Expense of State passenger traffic, including taxes..	132,738.05	
Total expense		$206,498.72
Net profit on State freight and passenger traffic		$85,964.39
Diminution in State freight revenue if the freight laws involved had been in force		9,989.43
Net revenue had freight laws involved been in force		$75,974.96
The value of the property used for State freight and passenger traffic, including franchises, being $1,256,467.44, and the net returns being $75,974.96, by making the division, gives net return of		6.04%
Upon the valuation, less the franchise, the Rock Island received a net return (divide $75,974.96, by $1,002,286.77), of.		7.58%

In this example with the franchise included, the return is 6.04 per cent, and with the franchise deducted the return is 7.58 per cent.

So viewing the rate question separately as to freight or considering the State business in its entirety in each and every instance, exceptionally reasonable returns have been given to the road. In all these examples we figured the franchise in so as to demonstrate that even when the franchise value was considered the returns were ample. As a matter of law, however, the Rock Island is not entitled to any returns upon the franchise value. We will now give the final result in the following table, leaving out the returns with the franchise value included:

FINAL RECAPITULATION OF RETURNS—TABLE OF RETURNS ON EACH SEPARATE CLASS, FREIGHT AND PASSENGER, AND WHEN CONSIDERED TOGETHER, FRANCHISE VALUE DEDUCTED.

Return State freight, 30 per cent extra cost basis	14.96%
Return State passenger, 10 per cent less than interstate cost basis	.90%
Return State freight and passenger traffic together	7.50%
Return State freight, 50 per cent extra cost basis	13.41%
Return State passenger, 20 per cent less than interstate cost basis	1.01%
Return State freight and passenger traffic together	7.58%

Kansas City Southern Ry. Company Case.

(No. 682. Knott et al., Apps., v. Kansas City S. Ry. Co.)

NET PER CENT RETURN FIGURED ON ROAD'S OWN STATEMENTS, ETC.

I.

VALUATIONS.

THE TOTAL VALUE OF THE PROPERTIES OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY IN MISSOURI, TOGETHER WITH THE SEPARATE AMOUNTS OF THAT PART OF THE VALUATION, ASSIGNABLE TO STATE FREIGHT AND STATE PASSENGER TRAFFIC, AND UPON WHICH SEPARATE VALUES IT IS ENTITLED TO A REASONABLE RETURN. THE COMPANY, HOWEVER, IS NOT ENTITLED TO ANY RETURN UPON THAT PART OF THE VALUATION REPRESENTED BY ITS FRANCHISE.

The first factor which must be known is the reasonable value of the properties of the K. C. S. used in handling its traffic in Missouri, State and interstate. Having ascertained the fair value of those properties, it must next be ascertained what part of that value is to be assigned to the State passenger traffic and what part is to be assigned to the State freight traffic, to the end we may know upon what amount the company is entitled to a return in each of the acts, passenger and freight, involved and to the end we may know whether or not considering the whole rates and its entire State business, the company is receiving a reasonable return.

The court, on page 5311 of the printed record, found the value of the properties of the K. C. S. in Missouri, to be $8,039,084.40, and also found on the same page, that the value per mile was $46,075.00, and that the number of miles in Missouri was 174.48. The court, in fixing this valuation, fixed exactly the valuation placed upon same by the State Board of Equalization of the State of Missouri on the theory

that the Board aimed to assess at onethird of the value of the properties. In other words, the evidence offered was merely the judgment of the State Board of Equalization. That was not the way to prove and establish the fair value of the properties of the company in Missouri. This value was a matter of affirmative proof which the road could not shift and from which it could not relieve itself. The judgment of the Board may have been faulty and it may have reached a valuation for assessment purposes more than one-third. The court cannot accept and receive its judgment for the purposes of this case.

That this was the way in which the proof was made and upon which the court based its finding as to value, we cite the court to pages 5043 to 5064 and 5180, printed record. We also call the court's attention to the following on page 1039, printed record:

> "It is agreed between the parties that the basis of the assessment is upon the basis of one-third of the value of the property, in the judgment of the Board."

The following quotation is taken from K. C. S., Exhibit No. 1, at page 5047, printed record:

> "The value fixed by the State Board of Equalization shows the rate to be confiscatory. The assessment for 1908 was $2,679,694.80, and this was as will be conceded by the State upon one-third of the value as determined by that body. This makes a valuation of $8,039,084.40.

Thus, it will be seen that the court has taken as the valuation of the properties to the *very cent three times* the valuation fixed by the State Board of Equalization, and did

so on the strength of the evidence furnished by the records of the State Board of Equalization offered in evidence and upon the theory that the Board had fixed the value at one-third. In other words, the proof of valuation rests solely upon the judgment of the State Board of Equalization in a record written for another purpose, to wit, taxation. Aside from all this, both the complainant and the court adopted the *wrong theory*, as to what constituted proof of the valuation and what were the elements thereof.

The value as found by the court included the franchise value. The assessment of the franchise value made by the State Board (Record V, p. 5182), of the line of the K. C. S. in Missouri, evidence being offered by the road, was $348,-966.48. This being the sum assessed as the value of the franchise for taxation on a supposed basis of one-third value, this sum must be multiplied by three on the above basis making the franchise value of the properties in the State belonging to the K. C. S. amount to $1,046,899.44.

The franchise value then is 13.02 per cent of the total valuation of the properties in the State as fixed by the Board of Equalization. When the franchise value is deducted from the value found by the court, it leaves the total valuation of the properties less the franchise, $6,992,184.96. Should this Honorable Court hold the proof as made as to the valuation of the properties was proper and sufficient, then the value upon which the returns should be figured are as follows:

Total valuation, including franchise, of all properties in Missouri of the K. C. S., same being three times the amount fixed by the State Board of Equalization (Exhibit 86, p. ——, Record).....	$8,039,084.40
Without franchise	6,992,184.96

Value of that part including franchise assignable to State freight is 4.42 per cent of $8,039,084.40, as State freight is 4.42 per cent of the gross earnings of all business, and is (Exhibit 86, supra).	355,327.52
Value without franchise	309,054.58
Value of that part including franchise and assignable to State passenger traffic is 4.05 per cent of $8,039,084.40 as State passenger traffic is 4.05 per cent of the gross earnings of all business (Exhibit 85, Record 5057), and is	325,582.92
Value without franchise	283,183.49

Inasmuch as the earnings, expenses and net earnings, as set forth in Exhibit 1, are those of one-half year only, the valuations shown above must be divided by 2, in order to arrive at comparable bases for purposes of measuring the return thereon.

This gives us the following table as to the valuation of properties for the purpose of returns:

TABLE OF VALUATIONS.

Total valuation of all properties including franchise	$4,019,542.20
Total valuation of all properties without franchise	3,496,092.48
Value assignable to State freight, including franchise	177,663.76
Value assignable to State freight without franchise	154,527.29
Value assignable to State passenger, including franchise	162,791.46

Value assignable to State passenger without franchise	141,591.74
Value assignable to both State freight and passenger traffic, including franchise	340,455.22
Value assignable to both State freight and passenger traffic without franchise	296,119.03

These values as applied to the whole properties and as applied to the State freight traffic and the State passenger traffic, both with and without the franchise value, give us every factor in reference to valuations necessary to solve the problem.

II.

REVENUES.

REVENUE OF KANSAS CITY SOUTHERN RAILWAY COMPANY IN MISSOURI FOR THE SIX MONTHS ENDING JUNE 30, 1908.

The second factor to be ascertained is the total amount of revenue the Kansas City Southern Railway Company has received from its business in Missouri, both State and interstate. This is the second step to be taken in solving the mathematical problem.

The total freight earnings in Missouri for the six months ending June 30, 1908 (Exhibit 86, page 5058, Printed Record), were $885,045.29. Full explanation and evidence as to exhibit is found on pages 4698-4706 of record. Of this amount the earnings on the State freight business were $46,282.40, and the earnings on interstate freight business were $838,762.89.

The total passenger earnings in Missouri for the six months ending June 30, 1908 (Exhibit 85, pages 5056-5057, printed record), were $161,343.40, of which amount the earnings on State passenger business were $42,358.33, and the earnings on interstate passenger business were $118,-985.07. Explanation of and evidence as to Exhibit 85, is found on pages 5056-5057, record.

Thus, the total passenger and freight revenue received by the K. C. S. from its entire business, State and interstate in Missouri for the six months ending June 30, 1908, was $885,045.29 on freight and $161,343.40 on passenger, making a grand total of $1,046,388.69. From the above figures we have then the following table:

REVENUE TABLE.

STATE.

Revenue from State freight	$46,282.40
Revenue from State passenger.....	42,358.33
Total revenue State business....	$88,640.73

INTERSTATE.

Revenue from interstate freight.....	$838,762.89
Revenue from interstate passenger..	118,985.07
Total revenue interstate business	$957,747.96

GRAND TOTAL.

Total revenue State business, freight and passenger	$88,640.73
Total revenue interstate business, freight and passenger	957,747.96
Grand total	$1,046,388.69

The ton miles of State and interstate freight are set forth in Exhibit 86, page 5060, record, as follows:

State—1,166,485, or 1.12 per cent whole number ton miles.

Interstate—102,665,456, or 98.88 per cent whole number ton miles.

The passenger miles, according to the road's Exhibit 85, page 5058, record, are:

State—1,638,254, or 25.08 per cent of whole number.

Insterstate—4,894,211, or 74.92 per cent of whole number.

The State freight earnings of $46,282.40 is 4.42 per cent of the gross earnings of all business in the State.

The State passenger earnings of $42,358.33 is 4.05 per cent of the gross earnings of all business in the State.

With these ascertained and known revenues from both the freight and passenger business in Missouri, and with the amounts definitely known as to each class of business, whether State or interstate, and with the number of ton miles of freight, both State and interstate, known and the per cent each class is of the whole, and with the number of passenger miles known, both State and interstate, and the per cent of each of the whole, we have all the factors as to revenue necessary to a proper consideration of the subject and solution of the problems being submitted. We have called attention to these specic revenues and the classes, State and interstate, and the ton miles and passenger miles and percentages, because they will be referred to later, and will be useful in reaching the proper final result.

III.

EXPENSES.

TOTAL EXPENSES OF THE K. C. S. RAILWAY COMPANY FOR THE SIX MONTHS ENDING JUNE 30, 1908, TOGETHER WITH THE ASSIGNMENT OF THAT PART OF THE EXPENSE CHARGEABLE TO STATE AND INTERSTATE BUSINESS SEPARATELY, TOGETHER WITH AN ASSIGNMENT OF THE EXPENSE CHARGEABLE TO STATE FREIGHT AND STATE PASSENGER BUSINESS SEPARATELY. ALSO AMOUNT OF DIMINUTION OF REVENUE HAD FREIGHT ACTS BEEN IN FORCE.

The third factor necessary is the expense. The total amount of the expenses of the K. C. S. in the transaction of its entire business in Missouri, both State and interstate, for the six months ending June 30, 1908, and as given by the road itself, is, not including taxes and rentals (Exhibit 82 and ——), $712,730.10.

ASSIGNMENT OF FREIGHT EXPENSE.

Total freight expense undivided between State and interstate less taxes, rentals, etc. (Exhibit 86, page 5058, printed record), not including taxes and rentals, is..	$571,297.54

This total freight expense divided between State and interstate on the basis of ton miles (Exhibit 86), is as follows:

Expense chargeable to State freight, not including taxes and rentals, is (Exhibit 86, printed record)..	6,398.53
Expense chargeable to interstate freight is (Exhibit ——, printed record)	564,899.01

ASSIGNMENT OF PASSENGER EXPENSE.

Total passenger expense undivided between State and interstate, less taxes and rentals (Exhibit 85, printed record, 5056), is.....	$141,432.56
Total passenger expense divided between State and interstate on the basis of passenger miles (Exhibit 85), is as follows:	
Expense chargeable to State passenger traffic is (Exhibit 85, printed record)	35,471.28
That part of expense chargeable to interstate passenger traffic is (Exhibit 85, printed record).....	105,961.28

TAXES AND RENTALS.

The amount of taxes and rentals assigned to State freight expense (Exhibit ——, p. ——, record), is	$250.11
The amount of taxes and rentals assigned to State passenger expense (Exhibit ——, p. ——, record), is	937.32

DIMINUTION IN REVENUE HAD FREIGHT LAWS INVOLVED BEEN ENFORCED.

If the freight laws in question had been in force, the diminution in revenue on State freight would have been (Exhibit 86, p. 5059 and p. ——, record explaining the exhibit)	2,957.58

We now have all the factors necessary to state the problem and work the example. There is no diminution to consider in the passenger fare law, because it was placed in force and the passenger revenue increased.

IV.

FREIGHT.

STATEMENT AND SOLUTION OF STATE FREIGHT EXAMPLE.

From the given factors the problem as to the net per cent return on State freight traffic is stated as follows:

If that part of the total valuation of the properties of the Kansas City Southern Railway Company in Missouri, assignable to the State freight traffic, including franchise, is $177,663.76, and without the franchise is $154,527.29; and, if the revenue of the road on its State freight traffic for the six months ending June 30, 1908, is $46,282.40; and, if its expense in handling said State freight for that year is as set forth in the following tables; and, if the K. C. S. had obeyed the Missouri freight laws involved, its revenue on State freight for said period would have been reduced $2,957.58; what per cent. would the road have received on its said valuation, both with and without the franchise, had the freight laws involved been in force?

They say, however, there is some evidence to the effect that it costs 30 per cent. more *per ton mile* to handle State freight than it does to handle interstate freight. Very well, we will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $8,283.81 (Vol. V, Exhibit 103, Record 5059).

NO. 1.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 30 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State		$46,282.40
Expense of handling State freight (Exhibit 86, p. 5059, Record)	$8,283.81	
Taxes and rentals assignable to State freight	250.11	
Total expense		8,533.92
Net profit on State freight		$37,748.48
Diminution in State freight revenue if the freight laws involved had been in force		2,957.58
Net revenue had freight laws involved been in force		$34,790.90
The valuation of that part of the whole properties assigned to State freight, including franchise value, being $177,663.76, and the net returns, including the diminution had the freight laws involved been in force, being $34,790.90, then, if said freight laws had been in force, the K. C. S. would have received a net return on said valuation (divide $34,790.90 by $177,663.76) of		19.58%
The per cent of return, less the franchise value assignable to State freight, is (divide $34,790.90 by $154,527.29)		22.51%

Thus we see, even though we charge State freight with 30 per cent more expense per ton mile than we charge interstate freight, the K. C. S. gets a return of 19.58 per cent on that part of the valuation assigned to State freight, including franchise value, and a return of 22.51 per cent with the franchise value deducted. So with these freight laws involved in force it would receive 19.58 per cent return in the one instance and 22.51 per cent return in the other.

They say, however, there is some evidence to the effect that it costs 50 per cent more *per ton mile* to handle State freight than it does to handle interstate freight. (Judge McPherson found that on the "revenue basis," a different basis to the *ton mile*, it cost 50 per cent more to handle State freight than it did interstate freight, Vol. V, p. 8, page 5310, Record. As State freight rate is two times as much as the interstate rate, Exhibit 36, Vol. II, page 2407, Record, this finding that it costs 50 per cent more is a finding that it costs *three times* as much to handle *State freight as interstate freight* on the revenue basis because the rate in one is *twice* as great as the other, and which is ridiculous and absurd.) We will solve the example, however, on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $9,540.67 (Vol. V, Exhibit 81, Record 5042).

NO. 2.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 50 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight		$46,282.40
Expense of handling State freight (Exhibit 86, p. 5059, Record	$9,540.67	

Taxes and rentals assignable to State freight	250.11	
Total expenses		9,790.78
Net profit on State freight.....		$36,491.62
Diminution in State freight revenue if the freight laws involved had been in force		2,957.58
Net revenue had freight laws involved been in force		$33,534.04
The valuation of that part of the whole properties assigned to State freight, including franchise value, being $177,-663.76, and the net returns, including the diminution had the freight laws involved been in force, being $33,534.04, then, if said freight laws had been in force, the K. C. S. would have received a net return on said valuation (divide $33,534.04 by $177,-663.76) of		18.87%
The per cent of return, less the franchise value assignable to State freight, is (divide $33,534.04 by $154,527.29, being total value less the franchise value assigned to State freight).....		21.70%

So, on the basis of State freight costing 50 per cent more per ton per mile to handle than interstate freight gives a return of 18.87 per cent with the franchise value included and 21.70 per cent with franchise value deducted.

V.

PASSENGER.

STATEMENT AND SOLUTION OF STATE PASSENGER EXAMPLE.

From the given factors the problem as to the net per cent return on State passenger traffic is stated as follows:

If that part of the total valuation of the properties of the Kansas City Southern Railway Company in Missouri, assignable to the State passenger traffic, including franchise, is $162,791.46, and without the franchise value is $141,591.74; and, if the revenue of the road on its State passenger traffic for the six months ending June 30, 1908, is $42,358.33; and, if its expense in handling said State passenger traffic for that period is as set forth in the following tables; what per cent did the road receive on its said valuation, both with and without the franchise value?

(The passenger rates were placed in force and there was no diminution of revenue, but on the other hand, the State passenger traffic increased under the reduced rate.)

There is evidence to the effect that it costs 10 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $32,741.64 (Vol. V, Exhibit 85, Record, p. 5057).

NO. 1.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 10 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic		$42,358.33
Expense of passenger traffic (Exhibit 85, p. 5057, Record)	$32,741.64	
Taxes and rentals assignable to passenger traffic	937.32	
Total expense		33,678.96
Net profit on State passenger traffic		$8,679.37
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $162,791.46, and the net returns being $8,679.37, then the K. C. S. received a net return on said valuation (divide $8,679.37 by $162,791.46) of		5.33%
Upon the valuation, less the franchise value, the K. C. S. received a net return (divide $8,679.37 by $141,591.74 of		6.14%

On the basis that the State passenger traffic costs 10 per cent less per passenger mile than the interstate traffic, the K. C. S. received a net return of 5.33 per cent on that part of the valuation, including franchise value, assigned to State passenger traffic, and received a net return of 6.14 per cent with the franchise value deducted.

There is evidence to the effect that it costs 20 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $29,870.55. (Vol. V, Exhibit 85, Record, p. 5057.)

NO. 2.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 20 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic....		$42,358.33
Expense of passenger traffic (Exhibit 85, p. 5057, Record)	$29,870.55	
Taxes and rentals assignable to passenger traffic	937.32	
Total expense		30,807.87
Net profit on State passenger traffic.....		$11,550.46
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $162,791.46, and the net returns being $11,550.46, then the K. C. S. received a net return on said valuation (divide $11,550.46 by $162,791.46) of..		7.09%
Upon the valuation, less the franchise value, the K. C. S. received a net return (divide $11,550.46 by $141,591.74 of		8.17%

On the basis that the State passenger traffic cost 20 per cent less per passenger mile than the interstate traffic, the K. C. S. received a net return of 7.09 per cent on that part of the valuation, including franchise value assigned to State passenger traffic, and received a net return of 8.17 per cent with the franchise value deducted.

RECAPITULATION.

The actual working of the problem, both freight and passenger, discloses the fact that the K. C. S.'s return upon the valuation of the property assigned to State freight on the several cost bases ranges from 18.87 per cent to 19.58 per cent with the franchise value included and from 21.70 per cent to 22.51 per cent with the franchise value deducted. That the return upon the valuation of the property assigned to State passenger traffic on the several cost bases ranges from 5.33 per cent to 7.09 per cent with the franchise value included, and from 6.14 per cent to 8.17 per cent with the franchise value deducted.

Without further comment at this place we will give a recapitulation of the return in a table below and which speaks for itself in language more forceful than the sophistries of counsel, more forceful than the findings of the court based upon conjecture, and more forceful than the biased opinions of interested witnesses given without any actual knowledge or foundation upon which to base them. These results give us the real truth based upon and worked from the K. C. S.'s figures in the case.

RECAPITULATION TABLE—FREIGHT RETURNS.

1. Return on valuation, including franchise on basis costs 30 per cent more per ton mile to handle State than interstate freight.. 19.58%

With franchise value deducted..... 22.51%

2. Return on valuation, including franchise on basis costs 50 per cent more per ton mile to handle State than interstate freight... 18.87%
With franchise value deducted..... 21.70%

RECAPITULATION TABLE—PASSENGER RETURNS.

1. Return on valuation, including franchise on basis costs 10 per cent less per passenger mile to handle State traffic..... 5.33%
With franchise value deducted..... 6.13%
2. Return on valuation, including franchise on basis costs 20 per cent less per passenger mile to handle State traffic 7.09%
With franchise value deducted 8.17%

From the recapitulation tables we find that the returns to the road upon each and every basis of dividing expenses between State and interstate traffic, upon both freight and passenger laws involved, give adequate and reasonable returns, and even more.

Under the law (174 U. S. 739, supra) the rates, both freight and passenger, in the State and the business of the K. C. S. on those rates must be considered in their entirety.

The revenue upon State freight, as we have seen, is $46,282.40. The revenue upon State passenger traffic is $42,358.33, making the total revenue of both freight and passenger in the State $88,640.73. The total valuation of that part of the property assigned to State freight and State passenger traffic, including franchise, is $340,455.22, and without the franchise is $296,119.03. We shall, therefore, figure the returns upon both the freight and passenger business in the State considered together and upon the two bases upon which the State freight and State passenger traffic were figured.

VI.

STATE FREIGHT AND PASSENGER TRAFFIC CONSIDERED TOGETHER.

We will now figure the two together, as example No. 1 was figured as to each separately; that is to say, on the basis that the expense of handling State freight was 30 per cent more than interstate freight and the cost per passenger mile on State traffic was 10 per cent less than interstate passenger traffic.

NO. 1.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 30 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE, AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS TEN PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and State passenger traffic		$88,640.73
Expense of State freight, including taxes and rentals	$8,533.92	
Expense of State passenger traffic, including taxes and rentals	33,678.96	
Total expense		42,212.88
Net profit on State freight and passenger traffic		$46,427.85

Diminution in State freight revenue if the freight laws involved had been in force	2,957.58
Net revenue had freight laws involved been in force	$43,470.27
The value of the property used for State freight and passenger traffic, including franchise, is $340,455.22. The net returns being $43,470.27 by making the division gives a net return of....	12.76%
Upon the valuation, less the franchise, the K. C. S. received a net return (divide $43,470.27 by $296,119.03) of....	14.67%

On the entire State business on this basis the return is 12.76 per cent with the franchise value included, annd 14.67 per cent with the franchise value deducted.

We will now figure the two together, as example No. 2 was figured as to each; that is to say, on the basis that the expense of handling State freight was 50 per cent more than interstate freight, and the cost per passenger mile on State traffic was 20 per cent less than interstate passenger traffic.

NO. 2.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 50 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE, AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS 20 PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and State passenger traffic	$88,640.73

Expense of State freight, including taxes and rentals	$9,790.78	
Expense of State passenger traffic, including taxes and rentals	30,807.87	
Total expense		40,598.65
Net profit on State freight and passenger traffic		$48,042.08
Diminution in State freight revenue if the freight laws involved had been in force		2,957.58
Net revenue had freight laws involved been in force		$45,084.50
The value of the property used for State freight and passenger traffic, including franchise being $340,455.22, and the net returns being $45,084.50, by making the division, gives net return of		13.24%
Upon the valuation less the franchise, the K. C. S. received a net return (divide $45,084.50 by $296,119.03), of.		15.22%

In this example with the franchise included, the return is 13.24 per cent, and with the franchise deducted the return is 15.22 per cent.

So viewing the rate question separately as to freight or separately as to passenger rates, or considering the State business in its entirety in each and every instance, exceptionally reasonable returns have been given to the road. In all these examples we figured the franchise in so as to demon-

strate that even when the franchise value was considered the returns were ample. As a matter of law, however, the K. C. S. is not entitled to any returns upon the franchise value. We will now give the final result in the following table, leaving out the returns with the franchise value included:

FINAL RECAPITULATION OF RETURNS—TABLE OF RETURNS ON EACH SEPARATE CLASS, FREIGHT AND PASSENGER, AND WHEN CONSIDERED TOGETHER, FRANCHISE VALUE DEDUCTED.

Return State freight, 30 per cent extra cost basis	22.51%
Return State passenger, 10 per cent less than interstate cost basis	6.13%
Return State freight and passenger traffic together	14.67%
Return State freight, 50 per cent extra cost basis	21.70%
Return State passenger, 20 per cent less than interstate cost basis	8.17%
Return State freight and passenger traffic together	15.22%

The Chicago Great Western Ry. Company Case.

(No. 700, Knott et al. App. v. C. G. W. Ry. Co.)

NET PER CENT RETURN FIGURED ON ROAD'S OWN STATEMENTS, ETC.

I.

VALUATIONS.

THE TOTAL VALUE OF THE PROPERTIES OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY IN MISSOURI, TOGETHER WITH THE SEPARATE AMOUNTS OF THAT PART OF THE VALUATION, ASSIGNABLE TO STATE FREIGHT AND STATE PASSENGER TRAFFIC, AND UPON WHICH SEPARATE VALUES IT IS ENTITLED TO A REASONABLE RETURN. THE COMPANY, HOWEVER, IS NOT ENTITLED TO ANY RETURN UPON THAT PART OF THE VALUATION REPRESENTED BY ITS FRANCHISE.

The first factor which must be known is the reasonable value of the properties of the Great Western used in handling its traffic in Missouri, State and interstate. Having ascertained the fair value of those properties, it must next be ascertained what part of that value is to be assigned to the State passenger traffic and what part is to be assigned to the State freight traffic, to the end we may know upon what amount the company is entitled to a return in each of the acts, passenger and freight, involved and to the end we may know whether or not considering the whole rates and its entire State business, the company is receiving a reasonable return.

The court, on page 5311 of the printed record, found the value of the properties of the Great Western in Missouri, to be $3,605,236.38, and also found on the same page, that the value per mile was $42,701.00, and that the number of miles in Missouri was 84.43. The court, in fixing this valuation, fixed exactly the valuation placed upon same by the State Board of Equalization of the State of Missouri on the theory

that the Board aimed to assess at one-third of the value of the properties. In other words, the evidence offered was merely the judgment of the State Board of Equalization. That was not the way to prove and establish the fair value of the properties of the company in Missouri. This value was a matter of affirmative proof which the road could not shift and from which it could not relieve itself. The judgment of the Board may have been faulty and it may have reached a valuation for assessment purposes more than one-third. The court cannot accept and receive its judgment for the purposes of this case.

That this was the way in which the proof was made and upon which the court based its finding as to value, we cite the court to pages 5106-5120, printed record. We also call the court's attention to the following on page 1039, printed record.

> "It is agreed between the parties that the basis of the assessment is upon the basis of one-third of the value of the property, in the judgment of the Board."

The following quotations is taken from Chicago & G. W., exhibit No. 1, at page 5109, printed record:

> "The value fixed by the State Board of Equalization shows the rate to be confiscatory. The assessment for 1907, was $1,201,745.46, and this was as will be conceded by the State upon one-third of the value as determined by that body. This makes a valuation of $3,605,236.38.

Thus, it will be seen that the court has taken as the valuation of the properties to the *very cent three times* the valuation fixed by the State Board of Equalization and did so on the strength of the evidence furnished by the records of the

State Board of Equalization offered in evidence and upon the theory that the Board had fixed the value at one-third. In other words, the proof of valuation rests solely upon the judgment of the State Board of Equalization in a record written for another purpose, to wit, taxation. Aside from all this, both the complainant and the court adopted the *wrong theory*, as to what constituted proof of the valuation and what were the elements thereof.

The value as found by the court included the franchise value. The assessment of the franchise value made by the State Board (Record V., pp. 5238-5239), of the lines of the Great Western in Missouri, evidence being offered by the road, was $221,512.12. This being the sum assessed as the value of the franchise for taxation on a supposed basis of one-third value, this sum must be multiplied by three on the above basis making the franchise value of the properties in the State belonging to the Great Western, amount to $664,-536.36.

The franchise value then is 18.4 per cent of the total valuation of the properties in the State as fixed by the Board of Equalization. When the franchise value is deducted from the value found by the court, it leaves the total valuation of the properties less the franchise, $2,940,700.02. Should this Honorable Court hold the proof as made as to the valuation of the properties was proper and sufficient, then the value upon which the returns should be figured are as follows:

Total valuation, including franchise, of all properties in Missouri of the C. G. W., same being three times the amount fixed by the State Board of Equalization (Exhibit 108, p. 5117, Record).	$3,605,236.38
Without franchise.	2,940,700.02

Value of that part including franchise assignable to State freight is 7.67 per cent of $3,605,236.38, as State freight is 7.67 per cent of the gross earnings of all business, and is (Exhibit 109, supra).....	$276,521.63
Value without franchise.....	225,551.69
Value of that part including franchise and assignable to State passenger traffic is 11.48 per cent of $3,605,-236.38 as State passenger traffic is 11.48 per cent of the gross earnings of all business (Exhibit 108, Record 5117), and is.....	413,881.14
Value without franchise.....	337,592.36

Inasmuch as the earnings, expense and net earnings set forth in Exhibits 108 and 109 are those of one-half year only, the valuations shown above must be divided by two, in order to arrive at comparable bases for purposes of measuring the return thereon.

This gives us the following table as to the valuation of properties for the purpose of returns:

TABLE OF VALUATIONS.

Total valuation of all properties including franchise.	$1,802,618.19
Total valuation of all properties without franchise.	1,470,350.01
Value assignable to State freight, including franchise.	138,260.81

Value assignable to State freight without franchise.	112,775.85
Value assignable to State passenger, including franchise.	206,940.57
Value assignable to State passenger without franchise.	168,796.18
Value assignable to both State freight and passenger traffic, including franchise.	345,201.38
Value assignable to both State freight and passenger traffic without franchise. .	281,572.02

These values as applied to the whole properties and as applied to the State freight traffic and the State passenger traffic, both with and without the franchise value, give us every factor in reference to valuations necessary to solve the problem.

II.

REVENUES.

REVENUE OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY IN MISSOURI FOR THE SIX MONTHS ENDING DECEMBER 31, 1907.

The second factor to be ascertained is the total amount of revenue The Chicago Great Western Railway Company has received from its business in Missouri, both State and interstate. This is the second step to be taken in solving the mathematical problem.

The total freight earnings in Missouri for the six months ending December 31, 1907 (Exhibit 109, page 5118, Printed Record), were $260,579.18. Full explanation and evidence as to exhibit is found on pages 4776-4781 of record. Of this amount the earnings on the State freight business were $29,-966.59, and the earnings on interstate freight business were $230,612.59.

The total passenger earnings in Missouri for the six months ending December 31, 1907 (Exhibit 108, page 5115, printed record), were $130,109.89, of which amount the earnings on State passenger business were $44,882.21, and the earnings on interstate passenger business were $85,227.68. Explanation of and evidence as to exhibit 108, is found on pages 4776-4781, record.

Thus, the total passenger and freight revenue received by the Great Western from its entire business, State and interstate in Missouri for the six months ending December 31, 1907, was $260,579.18 on freight and 130,109.89 on passenger, making a grand total of $390,689.07. From the above figures we have then the following table:

REVENUE TABLE.

STATE.

Revenue from State freight.....	$29,966.59
Revenue from State passenger.....	44,882.21
Total revenue State business.....	$74,848.80

INTERSTATE.

Revenue from interstate freight.....	$230,612.59
Revenue from interstate passenger..	85,227.68
Total revenue interstate business...	$315,840.27

GRAND TOTAL.

Total revenue State business, freight and passenger.	$74,848.80
Total revenue interstate business, freight and passenger.	315,840.27
Grand total.	$390,689.07

The ton miles of State and interstate freight are arrived at by using the ton miles of the St. Louis & San Francisco R. R. Co. as shown by Exhibit 2, page 5120 of Record, as follows:

State—1,675,043 or 6.9 per cent whole number ton miles.

Interstate—22,283,200 or 93.1 per cent whole number ton miles.

The passenger miles according to the road's exhibit 108, page 5115, record have been arrived at by using the average

passenger mile earnings State and interstate, of the St. Louis & San Francisco R. R. Company as shown above by exhibit 2, and are as follows:

State 1,974,353 or 32.06 per cent of whole number.

Interstate—4,182,708 or 67.94 per cent of whole number.

The State freight earnings of $29,966.59, is 7.67 per cent of the gross earnings of all business in the State.

The State passenger earnings of $44,882.21, is 11.48 per cent of the gross earnings of all business in the State.

With these ascertained and known revenues from both the freight and passenger business in Missouri, and with the amounts definitely known as to each class of business, whether State or interstate, and with the number of ton miles of freight, both State and interstate, known and the per cent each class is of the whole, and with the number of passenger miles known, both State and interstate, and the per cent of each of the whole, we have all the factors as to revenue necessary to a proper consideration of the subject and solution of the problems being submitted. We have called attention to these specific revenues and the classes, State and interstate, and the ton miles and passenger miles and percentages because they will be referred to later, and will be useful in reaching the proper final result.

III.

EXPENSES.

TOTAL EXPENSES OF THE CHICAGO GREAT WESTERN RAILWAY COMPANY FOR THE SIX MONTHS ENDING DECEMBER 31, 1907, TOGETHER WITH THE ASSIGNMENT OF THAT PART OF THE EXPENSE CHARGEABLE TO STATE AND INTERSTATE BUSINESS SEPARATELY, TOGETHER WITH AN ASSIGNMENT OF THE EXPENSE CHARGEABLE TO STATE FREIGHT AND STATE PASSENGER BUSINESS SEPARATELY. ALSO AMOUNT OF DIMINUTION OF REVENUE HAD FREIGHT ACTS BEEN IN FORCE.

The third factor necessary is the expense. The total amount of the expenses of the Great Western in the transaction of its entire business in Missouri, both State and interstate, for the six months ending December 31, 1907, and as given by the road itself is, not including taxes (Exhibit 109), $325,243.57.

ASSIGNMENT OF FREIGHT EXPENSE.

Total freight expense undivided between State and interstate less rentals, etc. (Exhibit 109, page 5107, printed record), not including taxes, is.....	$198,887.69
This total freight expense divided between State and interstate on the basis of ton miles (Exhibit 109), is as follows:	

Expense chargeable to State freight, not including taxes, is (Exhibit 109, printed record).....	13,723.25
Expense chargeable to interstate freight is (Exhibit 109, printed record)....	185,164.44

ASSIGNMENT OF PASSENGER EXPENSE.

Total passenger expense undivided between State and interstate (Exhibit 108, printed record, 5116), is.....	$126,355.88
Total passenger expense divided between State and interstate on the basis of passenger miles (Exhibit 108), is as follows:	
Expense chargeable to State passenger traffic is (Exhibit 108, printed record).....	40,509.70
That part of expense chargeable to interstate passenger traffic is (Exhibit 108, printed record).....	85,846.18

TAXES.

The amount of taxes assigned to State freight expense (Exhibit 109, p. 5119, record), is.....	848.30
The amount of taxes assigned to State passenger expense (Exhibit 108, p. 5117, record), is.....	3,626.67

DIMINUTION IN REVENUE HAD FREIGHT LAWS INVOLVED BEEN ENFORCED.

If the freight laws in question had been in force, the diminution in revenue on State freight would have been (Exhibit 109, p. 5119 and p. record explaining the exhibit).....	1,893.41

We now have all the factors necessary to state the problem and work the example. There is no diminution to consider in the passenger fare law, because it was placed in force and the passenger revenue increased.

IV.

FREIGHT.

STATEMENT AND SOLUTION OF STATE FREIGHT EXAMPLE.

From the given factors the problem as to the net per cent return on State freight traffic is stated as follows:

If that part of the total valuation of the properties of The Chicago Great Western Railway Company in Missouri, assignable to the State freight traffic, including franchise, is $138,260.81, and without the franchise is $112,775.85; and, if the revenue of the road on its State freight traffic for the six months ending December 31, 1907, is $29,966.59, and, if its expense in handling said State freight for that year is as set forth in the following tables; and, if the Great Western had obeyed the Missouri freight laws involved, its revenue on State freight for said year would have been reduced $1,893.41; what per cent. would the road have received on its said valuation, both with and without the franchise, had the freight laws involved been in force?

They say, however, there is some evidence to the effect that it costs 30 per cent. more *per ton mile* to handle State freight than it does to handle inerstate freight. Very well, we will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $17,760.67 (Vol. V, Exhibit 109, Record 5118).

NO. 1.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 30 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight.....		$29,966.59
Expense of handling State freight (Exhibit 109, pp. 5118, Record)....	$17,760.67	
Taxes and rentals assignable to State freight.....	848.30	
Total expense.....		18,608.97
Net profit on State freight.....		$11,357.62
Diminution in State freight revenue if the freight laws involved had been force.....		1,893.41
Net revenue had freight laws involved been in force.....		$9,464.21
The valuation of that part of the whole properties assigned to State freight, including franchise value, being $138,260.81, and the net returns, including the diminution had the freight laws involved been in force, being $9,464.21, then, if said freight laws had been in force, the Great Western would have received a net return on said valuation (divide $9,464.21 by $138,260.81) of.....		6.84%
The per cent. of return, less the franchise value assignable to State freight, is (divide $9,464.21 by $112,775.85)...		8.39%

Thus we see even though we charge State freight with 30 per cent more expense per ton mile than we charge interstate freight, the Great Western gets a return of 6.84 per cent on that part of the valuation assigned to State freight, including franchise value, and a return of 8.39 per cent with the franchise value deducted. So with these freight laws involved in force it would receive 6.84 per cent return in the one instance and 8.39 per cent return in the other.

They say, however, there is some evidence to the effect that it costs 50 per cent more *per ton mile* to handle State freight than it does to handle interstate freight. (Judge McPherson found that on the "revenue basis," a different basis to the *ton mile*, it costs 50 per cent more to handle State freight than it did interstate freight, Vol. V, p. 8, page 5310, Record. As State freight rate is two times as much as the interstate rate, Exhibit 36, Vol. II, page 2407, Record, this finding that it costs 50 per cent more is a finding that it costs *three times* as much to handle *State freight as interstate freight* on the revenue basis because the rate in one is *twice* as great as the other, and which is ridiculous and absurd.) We will solve the example, however, on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $19,888.77 (Vol. V, Exhibit 109, Record 5118).

NO. 2.

SOLUTION OF STATE FREIGHT EXAMPLE ON THE BASIS THAT IT COSTS 50 PER CENT PER TON MILE MORE TO HANDLE STATE FREIGHT THAN INTERSTATE FREIGHT.

Revenue from State freight.....		$29,966.59
Expense of handling State freight (Exhibit 109, pp. 5118, Record).....	$19,888.77	

Taxes and rentals assignable to State freight.....	848.30	
Total expenses.....		$20,737.07
Net profit on State freight.....		$9,229.52
Diminution in State freight revenue if the freight laws involved had been in force		1,893.41
Net revenue had freight laws involved been in force.....		$7,336.11
The valuation for that part of the whole properties assigned to State freight including franchise value being $138,-260.81, and the net return including the diminution had the freight laws involved been in force, being $7,336.11, then if said freight laws had been in force the Great Western would have received a net return on said valuation (divide $7,336.11 by $138,260.81) of..		5.30%
The per cent of return, less the franchise value assignable to State freight is (divide $7,336.11 by $112,775.85 being total value less the franchise value assigned to State freight).....		6.51%

So, on the basis of State freight costing 50 per cent more per ton per mile to handle than interstate freight gives a return of 5.30 per cent with the franchise value included and 6.51 per cent with franchise value deducted.

V.

PASSENGER.

STATEMENT AND SOLUTION OF STATE PASSENGER EXAMPLE.

From the given factors the problem as to the net per cent return on State passenger traffic is stated as follows:

If that part of the total valuation of the properties of The Chicago Great Western Railway Company in Missouri, assignable to the State passenger traffic, including franchise, is $206,940.57, and without the franchise value is $168,796.18; and, if the revenue of the road on its State passenger traffic for the six months ending December 31, 1907, is $44,882.21; and, if its expense in handling said State passenger traffic for that year is as set forth in the following tables what per cent did the road receive on its said valuation, both with and without the franchise value?

(The passenger rates were placed in force and there was no diminution of revenue, but on the other hand the State passenger traffic increased under the reduced rate).

There is evidence to the effect that it costs 10 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $37,666.69. (Vol. V, Exhibit 108, Record, p. 5116.)

NO. 1.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 10 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic.....		$44,882.21
Expense of passenger traffic (Exhibit 108, p. 5116, Record).	37,666.69	
Taxes assignable to passenger traffic . .:.....	3,626.67	
Total expense		$41,293.36
Net profit on State passenger traffic.....		$3,588.85
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $206,940.57, and the net returns being $3,588.85, then the Great Western received a net return on said valuation (divide $3,588.85 by $206,940.57), of..		1.73%
Upon the valuation, less the franchise value, the Great Western received a net return (divide $3,588.85 by $168,796.18) of..		2.12%

On the basis that the State passenger traffic costs 10 per cent less per passenger mile than the interstate traffic, the Great Western received a net return of 1.73 per cent on that part of the valuation, including franchise value, assigned to State passenger traffic, and received a net return of 2.12 per cent with the franchise value deducted.

There is evidence to the effect that it costs 20 per cent less per passenger mile to handle State passenger traffic than it does to handle interstate passenger traffic. We will solve the example on that basis. It only changes one factor, and that is the item of expense. On this basis the expense is $34,545.70. (Vol. V, Exhibit 108, Record, p. 5117.)

NO. 2.

SOLUTION OF STATE PASSENGER EXAMPLE ON THE BASIS THAT IT COSTS 20 PER CENT LESS PER PASSENGER MILE TO HANDLE STATE PASSENGER TRAFFIC THAN INTERSTATE PASSENGER TRAFFIC.

Revenue from State passenger traffic.....		$44,882.21
Expense of passenger traffic (Exhibit 108, p. 5117, Record)	$34,545.70	
Taxes assignable to passenger traffic	3,626.67	
Total expense		$38,172.37
Net profit on State passenger traffic.....		$6,709.84
The valuation of that part of the whole properties assigned to State passenger traffic, including franchise value, being $206,940.57, and the net returns being $6,709.84, then the Greate Western received a net return on said valuation (divide $6,709.84 by $206,940.57) of..		3.24%
Upon the valuation, less the franchise value, the Great Western received a net return (divide $6,709.84 by $168,796.18) of..		3.97%

On the basis that the State passenger traffic costs 20 per cent less per passenger mile than the interstate traffic, the

Great Western received a net return of 3.24 per cent on that part of the valuation, including franchise value assigned to State passenger traffic, and received a net return of 3.97 per cent with the franchise value deducted.

RECAPITULATION.

The actual working of the problem, both freight and passenger, discloses the fact that the Great Western's return upon the valuation of the property assigned to State freight on the several cost bases ranges from 5.30 per cent to 6.84 per cent with the franchise value included, and from 6.51 per cent to 8.39 per cent with the franchise value deducted. That the return upon the valuation of the property assigned to State passenger traffic on the several cost bases ranges from 1.73 per cent to 3.24 per cent with the franchise value included, and from 2.12 per cent to 3.97 per cent with the franchise value deducted.

Without further comment at this place we will give a recapitulation of the return in a table below and which speaks for itself in language more forceful than the sophistries of counsel, more forceful than the findings of the court based upon conjecture, and more forceful than the biased opinions of interested witnesses given without any actual knowledge or foundation upon which to base them. These results give us the real truth based upon and worked from the Great Western's figures in the case.

RECAPITULATION TABLE—FREIGHT RETURNS.

1. Return on valuation, including franchise on basis costs 30 per cent more per ton mile to handle State than interstate freight..... 6.84%
   With franchise value deducted..... 8.39%

2. Return on valuation, including franchise on basis costs 50 per cent more per ton mile to handle State than interstate freight..... 5.30%
With franchise value deducted..... 6.51%

RECAPITULATION TABLE—PASSENGER RETURNS.

1. Return on valuation, including franchise on basis costs 10 per cent less per passenger mile to handle State traffic..... 1.73%
With franchise value deducted..... 2.12%
2. Return on valuation, including franchise on basis costs 20 per cent less per passenger mile to handle State traffic..... 3.24%
With franchise value deducted..... 3.97%

Under the law (174 U. S. 739, supra), the rates, both freight and passenger, in the State and the business of the Great Western on those rates must be considered in their entirety.

The revenue upon State freight, as we have seen, is $29,966.59. The revenue upon State passenger traffic is $44,882.21, making the total revenue of both freight and passenger in the State $74,848.80. The total valuation of that part of the property assigned to State freight and State passenger traffic, including franchise, is $345,201.38, and without the franchise is $281,572.02. We shall, therefore, figure the returns upon both the freight and passenger business in the State considered together and upon the two bases upon which the State freight and State passenger traffic were figured.

VI.

STATE FREIGHT AND PASSENGER TRAFFIC CONSIDERED TOGETHER.

We will now figure the two together, as example No. 1 was figured as to each separately; that is to say, on the basis that the expense of handling State freight was 30 per cent more than interstate freight and the cost per passenger mile on State traffic was 10 per cent less than interstate passenger traffic.

NO. 1.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 30 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS 10 PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and State passenger traffic		$74,848.80
Expense of State freight, including taxes	$18,608.97	
Expense of State passenger traffic, including taxes	41,293.36	
Total expense		$59,902.33
Net profit on State freight and passenger traffic		$14,946.47
Diminution in State freight revenue if the freight laws involved had been in force		1,893.41
Net revenue had freight laws involved been in force		$13,053.06

The value of the property used for State freight and passenger traffic, including franchise, is $345,201.38. The net returns being $13,053.06 by making the division gives a net return of..... 3.78%

Upon the valuation, less the franchise, the Great Western received net return (divide $13,053.06 by $281,572.02) of.... 4.63%

On the entire State business on this basis the return is 3.78 per cent with the franchise value included, and 4.63 per cent with the franchise value deducted.

We will now figure the two together, as example No. 2 was figured as to each; that is to say, on the basis that the expense of handling State freight was 50 per cent more than interstate freight, and the cost per passenger mile on State traffic was 20 per cent less than interstate passenger traffic.

NO. 2.

SOLUTION OF STATE FREIGHT AND STATE PASSENGER TRAFFIC EXAMPLE WHEN THE RATES AND STATE BUSINESS ARE CONSIDERED IN THEIR ENTIRETY AND ON THE BASIS THAT THE EXPENSE OF HANDLING STATE FREIGHT IS 50 PER CENT MORE THAN INTERSTATE FREIGHT PER TON MILE AND THAT THE EXPENSE OF STATE PASSENGER TRAFFIC IS 20 PER CENT LESS PER PASSENGER MILE THAN INTERSTATE TRAFFIC.

Revenue from State freight and State passenger traffic		$74,848.80
Expense of State freight, including taxes	$20,737.07	
Expense of State passenger traffic, including taxes...	38,172.37	
Total expense		$58,909.44

Net profit on State freight and passenger traffic	$15,939.36
Diminution in State freight revenue if the freight laws involved had been in force	1,893.41
Net revenue had freight laws involved been in force	$14,045.95
The value of the property used for State freight and passenger traffic, including franchises being $345,201.38, and the net returns being $14,045.95, by making the division, gives net return of	4.07%
Upon the valuation less the franchise, the Great Western received a net return (divide $14,045.95, by $281,572.02), of	4.98%

In this example with the franchise included, the return is 4.07 per cent, and with the franchise deducted the return is 4.98 per cent.

So, considering the State business in its entirety in each and every instance, reasonable returns have been given to the road. In all these examples we figured the franchise in so as to demonstrate that even when the franchise value was considered the returns were ample. As a matter of law, however, the Great Western is not entitled to any returns upon the franchise value. We will now give the final result in the following table, leaving out the returns with the franchise value included:

FINAL RECAPITULATION OF RETURNS—TABLE OF RETURNS ON EACH SEPARATE CLASS, FREIGHT AND PASSENGER, AND WHEN CONSIDERED TOGETHER, FRANCHISE VALUE DEDUCTED.

Return State freight, 30 per cent extra cost basis	8.39%
Return State passenger, 10 per cent less than interstate cost basis	2.12%
Return State freight and passenger traffic together	4.63%
Return State freight, 50 per cent extra cost basis	6.51%
Return State passenger, 20 per cent less than interstate cost basis	3.97%
Return State freight and passenger traffic together	4.98%

(7)

St. Louis Kansas City & Colorado R. R. Co. Case.

(No. 680, Knott et al., Appellants, v. St. L., K. C. & Col. R. R. Co.)

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(8)

St. Louis & Hannibal Ry. Co. Case.

(No. 684, Knott et al., Appellants, v. St. L. & H. Ry. Co.)

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(9)

Kansas City, Clinton & Springfield Ry. Company Case.

(No. 698, Knott et al., Appellants, v. K. C., C. & S. Ry. Co.)

WE HAVE NO FIGURES NOR MATTERS SUFFICIENT TO FORMULATE THE PROBLEM AS TO THESE THREE ROADS, THE BRIEF IN ALL OTHER RESPECTS APPLYING TO THESE ROADS SAME AS OTHERS.

FINAL TABLE ON THE SIX ROADS FIGURED OUT.

Percentages of Return Earned on Portion of Property Assigned to State Business on Basis of Gross Earnings—Expenses Divided on Basis of Ton Miles and Passenger Miles.

	Freight.				Passenger.				Freight and Passenger Combined	
	30% Extra Cost.		50% Extra Cost.		10% Less Cost.		20% Less Cost.			
	Including Franchise.	Excluding Franchise.	Including Franchise.	Excluding Franchise.	Including Franchise.	Excluding Franchise.	Including Franchise.	Excluding Franchise.	State Freight 30% more and State Passenger 20% less than Interstate—including franchise.	State Freight 30% more and State Passenger 10% less than Interstate—excluding franchise.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY	13.44	18.00	10.65	14.28	10.09	13.52	12.47	16.71	15.69	15.54
ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY	12.41	15.26	10.76	13.23	5.72	7.04	6.76	8.31	10.74	10.52
KANSAS CITY SOUTHERN RAILWAY COMPANY	19.58	22.51	18.87	21.70	5.33	6.14	7.09	8.17	14.67	15.22
MISSOURI, KANSAS & TEXAS RAILWAY COMPANY	8.46	10.59	7.03	8.81	5.52	6.91	6.56	8.22	8.69	8.50
CHICAGO, GREAT WESTERN RAILWAY COMPANY	6.84	8.39	5.30	6.51	1.73	2.12	3.24	3.97	4.63	4.98
CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO	11.93	14.96	10.69	13.41	.75	.90	.80	1.01	7.50	7.58

When it is remembered that the trial court adopted the "REVENUE BASIS" in ascertaining the value assignable to State traffic, and that this court, in the case of Chicago, Milwaukee & St. Paul Railroad Co. v. Tompkins, 176 *U. S.* 176, *condemned that method; and, when it is remembered that the value assignable to the property engaged in State traffic, when the actual value is not proven, should be ascertained by finding the proportion that the number of ton miles of State freight bears to the number of ton miles of interstate freight, and the number of passenger miles in the State traffic bears to the number of passenger miles in interstate traffic, then the court can see and understand that TWICE the real value has been by the court (and used in our figures and examples) assigned to that part of the property engaged and used in State traffic. It necessarily follows that the actual percentages of returns on the value, as figured out in all our examples, is DOUBLE the percentages of return in each instance which we have shown, on the REAL VALUE of the properties employed in the State traffic.*

The Court must bear in mind that we have allowed all the enormous, colossal and unprecedented expenses of each road in determining the net per cent return on both State freight and State passenger traffic. We have taken what each said as being true merely for the purpose of the examples and to demonstrate that even upon the road's own figures it was receiving a high rate of interest upon the value of the properties employed.

It can no longer be doubted for a moment but what each road's net returns upon its State freight and State passenger traffic separately considered and when taken together give each a return far beyond what any court would say was a fair and reasonable return.

The balance of this brief will be devoted to a challenge of the findings of the court, the amount of the road's ex-

pense, its method of dividing the expense between State and interstate traffic and like questions. We shall discuss these questions first as applied to the freight acts, and, second, as applied to the passenger act, while, of course, the reasons and arguments, as applied to freight, applies equally to the passenger traffic.

PART III.

CHALLENGE AS TO THE CORRECTNESS OF THE FINDINGS OF THE TRIAL COURT, THE METHOD OF DIVIDING THE OPERATING EXPENSE BETWEEN STATE AND INTERSTATE TRAFFIC, THE AMOUNT OF OPERATING EXPENSE CHARGED TO MISSOURI, THE CHARACTER OF EVIDENCE RECEIVED, THE ABSENCE OF PRIMARY OR BEST EVIDENCE, ALTHOUGH WITHIN THE KEEPING OF THE RAILROADS AND LIKE QUESTIONS AS APPLIED, FIRST, TO FREIGHT RATES, AND, SECOND, TO PASSENGER RATES.

FREIGHT—DIVISION OF EXPENSE BETWEEN STATE AND INTERSTATE.

I.

THE COURT SHOULD NOT HAVE DIVIDED THE TOTAL FREIGHT EXPENSE BETWEEN STATE AND INTERSTATE TRAFFIC UPON THE BASIS OF GROSS REVENUE; AND SHOULD NOT HAVE ADDED 50 PER CENT TO THE EXPENSE OF HANDLING STATE FREIGHT IN ADDITION THERETO.

A.

The court divided the expense of the freight business between State and interstate traffic in each case on the gross revenue basis, and charged 50 per cent additional in the State freight expense. It is admitted that the gross revenue per ton received from State freight is twice as large as that received from interstate. In other words, it is admitted that the State rate is twice as much as the interstate rate. This being true, then, dividing the expenses between State and interstate traffic on the "revenue basis" charges State freight per ton with twice as much expense as the expense charged to interstate freight. That because the State rate is double that of interstate, therefore, the State freight expense account must be charged with twice as much. The road might be hauling in the same train, perhaps, in the same box car, two articles just alike, one coming from without the State and the other placed in the car within the State, and both to be delivered at the same point within the State, and for each mile these two articles move together, the court charges the State article with exactly twice the expense it charged the interstate article,

although, the fact is, that the actual expense for the same number of miles they traveled was exactly the same. The mere statement refutes the court's petition, it needs no argument.

But that is not all the court did; it added an additional 50 per cent. Just think what that means. On the gross revenue basis for division of expense adopted by the court, that basis alone charged to State traffic twice the expense per ton that was charged to interstate traffic. The adding of the 50 per cent charges, the *State traffic* with *three times* the expense per ton that is charged to *interstate traffic.* It is so *arbitrary* and *radical* it can but receive condemnation and shocks one's sense of justice and reason.

Let us illustrate it by example: Say Brown ships corn from Kansas City, Kansas, and also from Kansas City, Missouri, to Jefferson City, Missouri. The gross revenue received for the shipment of corn from Kansas City is $20.00. The gross revenue received for the shipment of corn from Kansas City, Kansas, is $80.00. The expense for shipping both was $70.00. The State shipment is 20 parts of the whole and the interstate is 80 parts of the whole. The expense under the finding of the court is divided in the following absurd way:

Multiply the 20 parts representing State freight by 3 (because the State freight is to be charged with three times the expense); this gives you 60. Now, 60 plus 80, equals 140. The State expense is then 60/140 or 3/7 of $70.00, which is $30.00; and the interstate shipment is charged with 80/140 or 4/7 of $70.00, which is $40.00. On this basis, the road lost $10.00 on its State shipment and cleared $40.00 on its interstate shipment. In other words, half of its gross earnings on the interstate haul was net profit. If the road was having a hearing before the *Interstate Commerce Commission* on such a proposition, it would unquestionably brand as *radical and absurd such a basis for division of expenses.*

Again, the expense cannot be divided on the gross revenue basis, because the *factors are not even.* The *main factor* to be considered is *twice as great* in the one instance per ton as it is in the other. Increasing the State rate does not increase the expense of the traffic, neither does a decrease in the rate, decrease the expense. The change in a rate has no effect on the expense. Doubling a rate does not double the expense. To use the "revenue basis" for the division of the expenses between State and interstate traffic, the rate on both classes of traffic would have to be the same, and the expenses on each class would have to be the same, so as to have even factors. But these factors are not even. The State revenue or rate is double the interstate per ton. With this being true, elementary logic and mathematics should tell one you cannot divide the expense on the *revenue basis,* lest you burden one with an unjust expense and relieve the other of an expense which it must justly bear.

If the court's basis of dividing the expense is correct, then it costs just *three times* as much *per ton* to handle State as interstate traffic, no matter whether it be hay, grain, coal, rocks or watermelons. If then the Legislature should, tomorrow, *double the States rates,* the Legislature would by that action, *ipso facto, double the expense* for handling State freight, and the court must then say, it costs *six times* as much to handle *State* freight *as interstate* freight, although the fact is there was no actual change in the cost or expense whatever. The basis is reduced to an absurdity.

Again, if the road should run an interstate train free for one month and should operate a State train as usual, then there would be no revenue from the interstate train and in the division of expense between State and interstate traffic under the road's contention and the court's finding the whole expense of operating the two trains must be borne by the State train or assigned to the State traffic. If both trains

should be run free of charge for a month there would be no revenue, consequently no revenue basis for the division of expenses. Upon what basis would the court then divide the expense? Unquestionably on the ton mile or passenger mile basis.

There can be no question in the minds of this or any other court as to the accuracy of the statements of the late Mr. Justice Brewer in the case of Ames v. Union Pacific Railroad Company, 64 Fed. 182, in addressing himself to this same subject, and wherein he held there was no relation between expenses and revenue, and that under changed conditions as to rates.

> "Obviously the cost of transportation would be the same, whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by House Roll 33."

This ought to clearly demonstrate to the court the manner in which the application of the revenue theory will, under differential rates or in any event where the rates are not on an absolute equality work a hardship on one or the other in accordance with the general disparity between rates, when the expenses are apportioned on the ratio that the gross revenue of the one bears to that of the other. The factors are not equal. A division of expense with unequal factors is bound to be wrong.

The late Mr. Justice Brewer, in Chicago, Milwaukee & St. Paul Railroad Company v. Tompkins, 176 U. S. 176, reversed the case because of the application of the revenue theory in finding values, and shows by an example how absurd the theory becomes when thus applied, saying:

> "Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was, can be made apparent by

further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts both from interstate and local business were $1,000,000, one-half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one-fifth of what they had been, so that instead of receiving $500,000 the company only received $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts $1,667,000. But if $1,667,000 worth of property earns $100,000, it earns six per cent. In other words, although the actual receipts from local business are only one-fifth of what they were, the earning capacity is three-fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000 and it earned $500,000, its earning capacity was the same as that employed in local business—six per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced."

If you can not use the revenue theory to find values neither can you find expenses, an equally important factor in the problem.

In the case of Atlantic Coast Line Company v. Ellis, 203 U. S. 256, at page 260, the late Mr. Justice Brewer, speaking of this difficulty, used this significant language:

> "We are aware of the difficulty which attends the proof of the cost of transporting a single article and in order to determine the reasonableness of a rate prescribed it may sometimes be necessary to adopt as a basis the average rate of all transportation *per ton per mile.*"

The complainant cites the case of Smyth v. Ames, 169 U. S. 466, as an authority for the revenue theory. It is not an authority upon that proposition. The revenue theory was not presented to the court. The court had no opportunity to make a choice as to theories or basis upon which to make a division of expenses between State and interstate traffic. A reading, however, of the opinion discloses that the property was divided upon the mileage basis and the expenses upon the basis of the *per ton per mile.* At page 529 Mr. Justice Harlan, in speaking of the alleged extra cost of carrying local freight, says expressly that the extra cost of local as against through freight is so much *per ton per mile.* The tables on pages 530, 531, 532, 536 and 538, in said opinion, are all figured upon the basis of carrying *one ton of freight one mile and one passenger one mile;* that is, the freight *per ton per mile and the passenger per mile.* This Honorable Court has never passed away from this *per ton per mile and passenger per mile method.*

Judge Trieber, in St. Louis Southwestern Ry. Co. v. Allen, 187 Fed. 291, finds that the gross earnings method must be wrong. He says (p. 321):

> "The straight revenue theory, as advanced by the learned consel and accountants of the railroads is clearly wrong, as none of them take into consideration the increased rates charged for the intrastate traffic. No further proof of the fallacy of this theory is required than the examples and calculations of the accountants for the railroads in the exhibits filed with their testimony. Mr. Nay, who, at the time he testified, had thirty-seven years' experience as a railroad accountant, having begun as a clerk of statistics, and was at the time his testimony in these cases was taken, the comptroller of the Chicago, Rock Island & Pacific Rilway Co., one of the great railroad systems of the country, gave the following illustration for the purpose of establishing the correctness of his theory and to controvert, as he states, 'an argument which is sometimes used to the effect that using the revenue basis is like traveling in a circle, and those who take that position claim that when the revenue of intrastate traffic is doubled the operating expenses are also doubled and the end is just the same as in the beginning.' He thereupon gives the following illustration to demonstrate the fallacy of that argument, as he states:
>
> " 'First take for illustration a small railroad with freight operating revenue of $100,000 and freight operating expenses of $80,000, of which the intrastate freight traffic is $25,000 and the interstate

freight traffic is $75,000. We have the following statement:

	Intrastate.	Interstate.	Total.
Operating freight revenue	$25,000.00	$75,000.00	$100,000.00
Operating freight expenses, divide the expense between the intrastate and interstate on a revenue basis and it would be as follows	20,000.00	60,000.00	80,000.00
Net operating freight revenue	$5,000.00	$15,000.00	$20,000.00

" 'Suppose that the rates on intrastate freight traffic are increased so as to exactly double the intrastate freight revenue, leaving the interstate freight revenue just the same and the operating freight expenses exactly the same, an impossible condition in actual practice, but the extreme condition is used in order to emphasize the error of the argument that doubling the intrastate revenue in such a case would double the intrastate expenses. After doubling the intrastate freight revenue just mentioned we would have the following statement:

	Intrastate.	Interstate.	Total.
Operating freight revenue	$50,000.00	$75,000.00	$125,000.00

Operating freight expenses to intrastate revenue nearly 40 per cent of the total revenue, the operating expenses of $80,000.00 divided on the revenue basis would now be.	32,000.00	48,000.00	80,000.00
Net operating revenue	$18,000.00	$27,000.00	$45,000.00

"'From this it will be seen that although the intrastate freight earnings were increased $25,000.00 after the intrastate tariff rates had been raised 100 per cent without any increase in expenditures, in the final result it is the beneficiary to the extent of $13,000 only, while the interstate earnings, with no increase in these rates, increased $12,000.'"

The inevitable result of the gross revenue theory is to announce the proposition that if the State traffic has no earnings it has no expense. That if the states would only place the rates low enough there would be no confiscation.

It is capable of demonstration to a mathematical certainty that the gross earnings basis is absolutely fallacious. Under the gross earnings basis, which assigns the operating expenses, for instance, as between the freight and the passenger traffic on the percentage which the total gross earnings from each class of traffic bears to the total gross earnings

within the State, the higher the rate in any particular class of traffic, the higher the assignable portion of the operating expenses to that traffic.

For the purpose of further demonstration, we will assume that the total gross earnings of the railway company in any state amount to one million dollars, and that this is contributed to equally by each class of traffic, which would make the total gross earnings from the freight traffic $500,000, and the total gross earnings from the passenger traffic $500,000. It is a well known fact that the operating expenses of any particular class of traffic do not increase in proportion to the increase in business. Instead of charging the rate for the transportation of freight under which this earning is produced, let us again assume that the freight rates are advanced 50 per cent, but, under the advanced freight rates the identical traffic is hauled which produced, under the old rates, a gross earning of $500,000, and we have an income under the new rate of $750,000 without one single item of increase in the operating expenses.

Assuming, now, that the rate of fares charged to passengers is reduced 50 per cent and identically the same amount of business is conducted under the same conditions, the same number of passengers hauled on the same number of trains for the same distances, and under the reduced rate, we have a gross earning in the passenger traffic of $250,000; yet, within the State, the total gross earnings from all classes of traffic is the same, or one million dollars. Let us now see what has been the effect of the increase in freight rates and the reduction of passenger fares upon the assignmnt of the operating expenses as between the freight and passenger traffic on the gross earnings basis. We now find that the gross freight earnings bear a relation of 75 per cent to the total gross earnings within the State, and under the gross earnings basis 75 per cent of the operating expenses should be assigned to the

freight traffic, and as the gross earnings from the passenger traffic under the reduced rate bears the relation of 25 per cent to the total gross earnings within the State, then the balance of the operating expenses, or 25 per cent, would be assigned to the passenger traffic. It must be borne in mind that during this period, while the increased freight and the reduced passenger rates have been in effect, there has been absolutely no change whatever in the operating expenses of either class of traffic. The same trains have been operated and between the same points; the same identical amount of freight has been hauled at the same identical expense; the same number of passengers have traveled in the same number of trains for the same distances at the same identical expense as during the time when the higher rates were in effect; yet, under the gross earnings basis, without any effect whatever on the actual operating expenses, the proportion of operating expenses has been increased from 50 per cent to 75 per cent in the freight traffic, and has been reduced from 50 per cent to 25 per cent in the passenger traffic.

Again, we will assume, for the purpose of illustrating, that the total gross earnings for the freight traffic are $500,000.

Under this state of facts let us assume that the passenger fare is raised from three cents to ten cents per passenger per mile, and while this higher rate is in force, for, say a period of one year, the same number of passengers are carried under the same conditions, on the same trains, for the same distance, so that there is no difference whatever in the actual operating expenses, insofar as it is applied to the operating of passsnger trains. With the same number of passengers, at the increased rate of 10 cents per passenger per mile, we have increased the gross earnings of the passenger traffic over the present rate three and one-third times, so that the revenue derived from the passenger traffic is now $1,666,666.67. The

gross earnings from the freight traffic remain the same. By reason of the increased rate, the gross earnings from the passenger traffic are now three and one-third times what they were before the increased rate went into effect, with the consequent result that the advancement of the rate raised the percentage which the total gross passenger earnings within the State bears to the total earnings, and to that extent assigns the greater proportion of the operating expenses to the passenger traffic, without as a matter of fact, making one single dollar's difference in the true expense.

Again, let us assume that during the time of the inquiry the gross earnings from all classes of traffic remain at one million dollars, and under a three-cent rate then in effect the earnings from the freight and passenger traffic are $500,000 each. We will now reduce the rate on the passenger traffic from three to one cent per passenger per mile, assuming that no grater number of passengers are carried. What is the result? Under this reduced rate of one cent per passenger per mile, exactly the same volume of traffic is conducted for the year that the three-cent passenger fare has been in effect. The same number of trains have been operated at the same identical expense, and the same number of passengers have been carried the same distance. There is no actual change in the expense of operating the passenger business during the year that the one-cent rate has been in effect from the operating expense during the year while the three-cent rate was in effect, but the income has been reduced two-thirds. The income from the passenger traffic under this one-cent rate is now $166,666.67, while the freight traffic remains at $500,000. Under the gross earnings method the proportion of the gross earnings from the passenger business is about 25 per cent of the total gross earnings in the State, and the effect of this would be to assign to the freight traffic 75 per cent of the operating expenses and to the passenger traffic 25 per cent; but, as a matter of fact, in the actual operating expenses,

as between the two classes of traffic, there would be no change whatever.

Again, assuming that during the period covered by the inquiry the gross earnings from the freight traffic remained at $500,000, and the passengers were carried free of charge, but the same number of trains were run the same distance, and the same number of passengers were carried for the same number of miles. Under this method, whereby passengers were carried free of charge, there would be no gross earnings in the passenger traffic, and, consequently, all of the operating expenses in the particular state would be assignable to the freight traffic and there would be no operating expenses assignable to the passenger traffic. We submit that the foregoing illustrations demonstrate that the gross earnings basis is a mathematical absurdity.

The question naturally presents itself, upon what evidence did the court base any such finding.

The roads, although possessed of figures which would show the *actual cost* of handling *State* freight and the cost of handling *interstate freight*, preferred to offer as evidence the opinions, estimates and guesses of witnesses which it attempted to palm off as experts. These so-called experts were officers of the roads and their evidence discloses that it was not based upon *any facts* or *figures* nor upon *trial* or *tests*, but were mere opinions expressed off-hand and backed by reasons which were without reason and upon the whole the evidence is absolutely without any probative force. The evidence did not relate to cost of *State* and *interstate* traffic, but to *local* or *way trains* as compared with *through trains*. This freight in *local or way trains* is more than half interstate freight, pp. 4608-17, and exhibit 41, pp. 4935-8. The accountants offered by the State contradicted this evidence and showed conclusively that it was fallacious. In the next division of this brief ("B") we give the evidence of the roads upon which the court based its findings as to division of expense on the revenue basis:

B.

RAILROADS' EVIDENCE AS TO RELATIVE COST OF LOCAL BUSINESS AND THROUGH BUSINESS.

Charles Sturgis, Auditor of the Burlington, said it costs, "from three to seven times" as much to handle *local business as through business.*

Howard Elliott, President Northern Pacific (Vol. I, p. 425), said "I think it is rather difficult to say exactly; I should say anywhere from three to six or seven times greater for *local business* as compared with *through,* depending on the class of the branch and the amount of business on the branch. Q. Do you mean by the expense of handling a ton of freight per mile in your *local freight* business was three to six times as much as the expense of handling a ton of freight per mile in the *through* freight business? A. In a general way, yes. Q. You are not undertaking to make any comparison between expenses in proportion to revenue? A. No."

Mr. Rawn said (Record, Vol. I, p. 568):

"A. In my experience and the basis upon which we predicate our cost of operation, the cost of handling *local freight,* as we term it, in comparison with that which we term *through freight,* and in accordance with our statistics in the matter, we find that the direct train cost for exclusive train operation, which I shall endeavor to deal with as one item, and with other items separately—*the direct exclusive train cost, of* that which we term *local freight,* is about *three and a half* times that of handling *through freight.* That is, I reiterate, what we term exclusive train cost, or direct train cost."

Mr. Rawn declined to express any opinion as to the relative expense of handling State and interstate freight.

Darius Miller, Traffic Manager of the Burlington, said: "I have only seen part of the testimony, but I understand it is on the revenue basis, which seems to me that is fair and reasonable as any basis. (Vol. I, p. 607.)

Mr. Stuart, General Manager Erie Railroad (Vol. I, p. 691): "Q. Take for instance, how much more does it cost to do the *State business* than the *through interstate* where the stuff does not stop at all? A. Well, based upon my general experience, I should say it cost from five to eight times more."

Mr. Stith, Traffic Manager Missouri Pacific (Vol. II, p. 1492), said: "I have a general idea about that, Mr. Clardy; I do not know that I could give you any definite figures. My *impression* of the matter and *understanding,* has been the result of my connection with the business. I don't know that I have any detailed figures to submit—but it has always been my *idea* about, it, that the cost of doing the *purely local business* was very substantially greater than the cost of doing *through business.* And it has always seemed to me that the cost would be up to fully two and one-half times as much."

Mr. Doddridge, General Manager Missouri Pacific (Record, Vol. II, p. 1596), said: "In my judgment *State business* cost at a maximum, three times as much as the *through business,* and it may reach six or more times. Or, in other words, from three to six or more times."

Mr. Clark, Superintendent Missouri Pacific (Record, p. 1631): "Q. Do you mean by that, it costs four or five times as much to carry a ton of State freight as a ton of interstate freight? A. Yes, sir. Q. That would be on the *per ton per mile basis?* That is, a ton of freight for each mile carried, that it would cost the company *four or five times,* I understand you to say, as much to carry a *ton of State freight one mile* as a *ton of interstate freight one mile?* A. *Yes, sir.*"

Mr. Willard said (Record, Vol. I, p. 511):

"A. In saying what I have about the relative cost of

doing business, I have not had in mind at any time the revenue received from the business, because I know nothing about it. So, when you speak of the relation of the earnings (expense?) to revenue, I have no answer to make. I have no definite knowledge about it."

W. T. Fisher, Weigher in Missouri Pacific Railroad (Record, p. 1752), said: "A. *It costs from two to six times as much to earn a dollar* in State freight business as to earn a dollar in the interstate business." And yet, in the next breath (p. 1753), he says he does not take revenue into consideration. "Q. Then why would you say two to six times, putting it all on that basis? A. I said a little while ago, that the reason for the difference in two to six times, is to take account of the variation of interstate freight carried on local trains and State freight carried on through trains. Q. On that basis now, do you take into consideration the rates received for the carriage of State freight as compared with the rates received for the carriage of interstate freight. A. *No, sir; we are dealing only with the cost* of doing this business now. Q. You do not take into consideration the rates on the two different classes of freight? A. *No, sir; I have not taken that in.*"

Mr. Bethard, General Manager M., K. & T. (p. 1824, Record), said "I should say it would cost four or five times as much, *just off-hand,* I have never gotten down to actual *figures.* That would be an estimate."

Mr. Miller, General Manager Wabash (p. 2829-30, Record): "I should say that the business in Missouri would cost to handle it two or three times as much as the interstate or *through business,* as it is handled on the railroads. That is my impression" (p. 2811). "Q. Do I understand your opinion is based entirely upon the cost of doing the business *without regard to the rates charged?* A. *Entirely on the cost.*"

Mr. Gray, General Manager St. Louis & San Francisco (p. 3931, Record): "My *best conclusion* on that, is that it costs from three to five times as much to do the freight business which is purely State, as it does to do the *interstate and trans-state jointly.* Q. On what basis do you give these figures? The *ton mile* basis or the *revenue basis?* A. I *really had no particular basis in mind.*"

Mr. Tyler, Superintendent St. Louis & San Francisco R. R. Co. (p. 4101, (Record): "I think the difference in cost is somewhere between three and five times as great." On page 4128, he said: "I have no reference at all to the question of the *earnings of a certain amount* of *the question of revenue at all.*"

Mr. Whittenton, Superintendent Chicago, Rock Island & Pacific (p. 4157, Record): "What I mean by that was this expense in connection with earnings may be about two to one as between the two classes. Q. That is to say, it would cost about twice as much to earn a dollar in State as in interstate business? A. Yes, sir."

Mr. McPherson, Assistant General Manager of Missouri Pacific (p. 4288), Record): "How much more is the extra cost of handling State freight than interstate freight, how many times? A. Their relation in dollars and cents would be very difficult to determine. We know they exist so that the excess cost is between, in my judgment based on my exeperience, four and eight."

This is the sum total of the evidence upon which the court rests its findings, that the expense between State and interstate should be divided upon the gross revenue basis.

Practically every witness declared that his opinion, impression and guess hazarded, was not upon the *revenue basis* and in fact, disclaimed that it was so based. We recall but one witness (Darius Miller), who said that the rates or revenue was considered. They seemed to have no *definite* idea or

knowledge about the expenses one way or the other. They seemed to have *no practical knowledge* of what was meant by the stilted formula, *"three to six times as much," "two to four times as much," "four to eight times as much," "two times as much," "three to seven times as much,"* which they ceaselessly reiterated, but always with a minimum figure large enough to suit any theory which might seem plausible.

Nearly every man fixed his estimate on a comparison between *local business* or *way trains* with *through business* or *through trains.* They did not base the estimates as to the relative cost of *intrastate* freight and *interstate* freight. The record discloses that this *way train* which was so expensive, carried by *actual test,* 63 per cent interstate freight and 37 per cent State freight. (Exhibit 14, p. 2401 and pp. 1621-2 and p. 1159, Record). So in unloading this enormous expense upon the *way train* or *local freight train,* the witnesses have all unwittingly loaded this "three to six times as much," "four to eight times as much," etc., on the *interstate* commerce. Thus, they are hoisted upon their own petard.

Again. the less than carload State freight which the roads say must be peddled out along the roads, and which they say is the cause of this colossal expense, *is only* 1.32 *per cent of the total freight business in Missouri.* (Vol. II, pp. 1414-15, exhibit 36, line 15.) How is it possible for an item which is *only* 1.32 *per cent* of the total freight business of the Burlington in Missouri to become the bugbear or scapegoat to carry away a fabulous expense account?

If these officers of the roads who attempted to testify as *experts,* possessed no more *technical knowledge or information* upon the subject about which they were testifying, than to say that the cost was from "three to seven times as much" or "two to six times as much," then these gentlemen confess they possess no *information,* and their evidence is without probative force. If they have no more information than from three to seven times as much or two to six times as much, that

is no information, and they have imparted no knowledge. They should have produced the figures and the evidence showing the actual cost, and which evidence was within their keeping.

Complainant's witnesses in each case in attempting to justify their estimates, gave the following as the principal reasons why the way train was more expensive than the through train. (This was on the theory that the entire expense of the *way train* would fall on State freight. *Tests and facts* hereafter presented will show that *two-thirds of the entire freight* on the way trains is interstate, and *therefore two-thirds* the expense of such train must be borne by interstate traffic):

REASONS.

1. Length of haul of way train (52 miles), is less than through train (105 miles).

2. Way train has two terminal charges, and through train but one.

3. More waste space in way train than through.

4. Maintenance of sidetracks, tracks between division points, stations, etc., must be borne by way train.

5. Freight on the way train is handled more than on through train.

Each one of these reasons is fully answered in our main brief in the Burlington case, and would serve no useful purpose to notice same here.

Will say here, however, that Mr. Ludlam testified (p., Record 872), *that it costs more to handle interstate freight less than carload lots than it did State freight less than carload lots. Mr. Taliaferro testified to the same thing* (pp. 898-9 and 3022 of Record), *as did Mr. Bethard, Superintendent of Transportation of the Missouri, Kansas & Texas R. R. Co.* (pp. 1830-1, Record) *and Mr. Miller, General Manager of the Wabash Co.*

This is indeed significant in view of the court's findings and opinion.

II.

COMPLAINANTS' WITNESSES POSSESSED NO ACTUAL KNOWLEDGE OR INFORMATION ABOUT THE RELATIVE COST OF HANDLING INTRASTATE AND INTERSTATE FREIGHT, OR OF OPERATING WAY TRAINS AND THROUGH TRAINS, AND THE RECORD SO DISCLOSES. THE NECESSARY FACTORS THEY DID NOT KNOW.

The names of some of these witnesses are well known names. Some of them are chief or prominent in the management of successful railroad properties. And there are others holding less conspicuous, but most responsible positions, who have deserved them, who have earned them upon their merits. That they are capable men and successful men must be admitted, and is fully conceded. It is only justice to them to concede it, and not only to concede it, but to cheerfully declare it. They are capable and successful men, because as a result of their efforts and management the properties committed to their charge, in whole or in part, have been able to pay the interest upon their bonded indebtedness, and perhaps a satisfactory dividend to their stockholders.

But the attention of the managers of any railroad system is directed to the ultimate result; that ultimate result being the net profits from the operation of the system as a whole, including its entire territory, perhaps many states, including its entire operations, whether passenger or freight, whether State or interstate.

It has not been necessary for them, in their efforts to accomplish these results, to inquire whether it has cost more or less to transport in the same car one article of freight than

another; much less to separate those articles into the two classes of State and interstate freight. It has not been necessary, or even useful, in their management of the properties, to inquire how much of the contents of a way train or of a through train is State freight or interstate freight. Their subordinates, in loading cars with freight, have regard only to the point of its destination. It is immaterial to them whether that freight may be State or interstate. It has not occurred to railroad managers to inquire as to the relative cost of transporting State and interstate freight. Such knowledge has been neither necessary nor useful to them in the operation of their properties. It is, therefore, no reproach to them that they disclose their want of information, or gross misinformation regarding facts, material to the solution of the problem now before the court.

But the opinion of any man, to be accepted, must appear to be based upon his knowledge of facts. If a witness, therefore, offers an opinion which, to be valuable, must be based upon his knowledge of facts, and his testimony discloses that he either has no knowledge of the facts or that his opinion is based upon what he supposes to be the fact, when the fact is quite otherwise, we naturally reject his opinion. We cannot accept opinions as revelations appealing to our faith. There must be some substantial and visible basis of actual fact to support them. We do not accept opinions without reasons for them. And the reasons must appeal to our intelligence and our understanding. If the reasons offered seem far fetched, if their importance appears greatly magnified, we hesitate to regard them as adequate to support the opinion offered. In a matter of such great and general importance as that now presented to the court, if the issue on one side is supported principally by opinion evidence, it must be expected that the value of those opinions will be measured by the extent of the knowledge of material facts possessed by the witnesses who offer them.

It is therefore pertinent to examine this record with the view of scrutinizing the qualifications or want of qualifications of the witnesses to give opinions upon which a decree annulling the law of a State can properly be based. Because the decree of the court below *rests upon opinion and not upon facts;* opinions, in many instances, of witnesses who either disclaimed knowledge or assumed to possess knowledge of material facts, as to which other evidence demonstrated they had no knowledge whatever; whose assumptions were not even approximations of the actual facts.

THINGS THEY DID NOT KNOW.

Mr. Willard, vice-president of the complainant, had no idea and no information upon which to base an idea upon the important question as to relative tonnage of State and interstate freight on way and through trains. (Record, Vol. I, p. 512.)

He did not know and had no idea of the average length of haul in Missouri (pp. 527, 531).

He thought that less than carload freight, destined for the west and received by his company at St. Louis from one of its eastern connections, would not be unloaded at St. Louis and reloaded into another car on his road.

But all the evidence shows to the contrary.

And yet Mr. Willard, with misinformation, or total want of information regarding such material facts as these, does "not hesitate to say that in my opinion" the cost of doing State freight business "is not less than three times" that of interstate. (Record, Vol. I, p. 494.)

Mr. Elliot does not know the percentage of State freight on through trains, or on way trains (Record, Vol. I, pp. 431, 481, 483), or the percentage of less than carload business (p. 438).

Darius Miller, vice-president of the complainant, who gave his opinion that the cost in the State freight business was three times as much as in interstate, had no definite knowledge as to the proportion of State and interstate freight in *way trains*. (Record, Vol. I, p. 608.)

Mr. Sturgis, the General Auditor of the complainant, who had testified that the State business cost three to seven times as much *in proportion to revenue*, as the interstate, said he knew nothing about the relative proportion of rates on State and interstate traffic in Missouri. (Record, Vol. I, pp. 368-9.)

He knew nothing about rates and said: "I don't see a rate in a year." (Record, p. 333.)

He had no knowledge of the manner of handling the traffic or what percentage of business on local trains was State and interstate. (Record, p. 336.)

He knew nothing about the distribution of empty cars, saying: "That is not my business at all; that is only a general supposition I am giving you." (Record, p. 336.)

He knew nothing about the comparison between State and interstate rates and reiterated that he "does not see one rate in a year." (Record, p. 337.)

He said profit or loss on local business had nothing to do with the relation between local and through rates. (Record, p. 338.)

He did not know the amount of less than carload freight in interstate or State freight. (Record, p. 339.)

He did not know the rule with regard to the abandonment of freight trains when insufficient traffic is offered and did not know which was more profitable, local or interstate business. (Record, p. 341.)

He did not know anything about the manner of running freight trains. (Record, p. 342.)

He said he could not find a relationship between intrastate and interstate tonnage because the railroad did not have the waybills from which to determine it. (Record, p. 343.)

He did not know the average haul of local freight and said he could not ascertain it. (Record, p. 350.)

He could not tell the average ton mile haul of interstate freight nor separate it from the whole. He estimated the average intrastate haul at between eighty and one hundred miles, but said: "It is not based on actual record of movement." (Record, p. 351.)

He said the local freight expense for 1905, could not be determined. (Record, p. 363.)

He had no idea and could not even approximate the percentage of carload and less than carload freight. Nor had he any idea as to what percentage of the total intrastate business was less than carload. (Record, p. 366.)

He knew nothing about the relationship of one to the other nor had he any idea of the relative proportion so they could be expressed in figures. (Record, p. 367.)

He knew nothing as to the disparity of rates on the two kinds of traffic, but says that at an outside limit it might be double and that his basis was made without knowledge of rates. (Record, p. 369.)

He said that the waybills for July and August, 1906, were not to be had, this testimony was given in September, 1906. (Record, p. 387.)

In speaking of the handling of the traffic, he said he did not know the ton-mile cost nor whether the handling of traffic was measured by the revenue or on an imaginary or estimated ton-mile basis. (Record, p. 392.)

He did not know the percentage of State freight and said the tonnage cut no figure at all. (Record, p. 394.)

He had made no caluculation nor had any made, which

would show the revenue which would have been received by the company in 1904 and 1905, had the rates authorized by the Board of Railroad and Warehouse Commissioners been in effect.

He said, "I have not any idea at all, not the slightest," in speaking with reference to the interest earned by the sinking fund. (Record, p. 728.)

H. G. Clark, superintendent of one of the divisions of the Missouri Pacific Railroad, who had testified that in his opinion the State freight cost was four or five to one, had no opinion of the relative volume of the different classes of freight on his road, or of the relative proportion of carload and less than carload lots, but assumed that the *way trains* carried a larger per cent. of State than of interstate freight. (Record, Vol. II, 1632.) He would not even assume, for the purposes of a question, that the *way trains* carried more interstate than State freight (pp. 1633, 1639), although the performance of trains on his own road showed 63 *per cent. interstate and only* 37 *per cent. State freight* (Record, Vol. II, pp. 1589, 1531), and although, as appeared later by the testimony of Mr. Peabody of the Santa Fe Company (Exhibits 41 and 42, Vol. V, pp. 4935-8), that of the contents of *way trains* 69.8 per cent. in tons and 83.3 per cent. in ton miles was *interstate* freight.

Mr. Fisher of the Missouri Pacific Railway Company, who says it costs two to six times as much to earn a dollar in State as in interstate business, does not even take into consideration the rates on the two different classes of freight at all. (Vol. II, p. 1753.)

Mr. Bethard, Superintendent of Transportation of the Missouri, Kansas & Texas Railroad Company, testified that it costs four to five times as much for State as for interstate business.

It is interesting to inquire how much knowledge he possessed of material facts.

He said that 75 *per cent.* of the *State freight* business would be on the *way trains* and 25 per cent on the through trains. (Record, Vol. II, p. 1825.)

But the tests of Mr. Peabody of the Santa Fe Company showed that the *way trains carried only* 16.7 *per cent of the total State freight, and that* 83.3 *per cent of it was on through trains.* (Peabody's Exhibit 41 and 42, Record, Vol. V, pp. 4935-8.)

He thought that 98 per cent of the business on through trains was interstate freight, and 2 per cent State freight (p. 1826).

But in Doddridge's through trains, 7 per cent was State and 93 per cent interstate business. (Vol. II, p. 1589.)

He thought that of the freight on the *way trains* 95 per cent would be *State freight* and only 5 per cent interstate (p. 1826).

But in fact, on the Doddridge way trains it was 37 *per cent State and* 63 *per cent interstate.* (Record, Vol. II, pp. 1589, 1621.)

And on the Peabody way trains, State freight was 30.2 *per cent and interstate* 69.8 *per cent.* (Record, Vol. V, pp. 4935-8.)

He thought 40 *or* 50 *per cent* of the freight *on way trains* was less than carload. (Record, Vol. II, p. 1826.)

In fact, it is only 4 *per cent* (p. 1618).

And the opinion of this witness as to the extra cost to be charged to State freight is because of the great preponderance of State freight carried on *way trains* and of interstate freight on *through* trains. (Record, Vol. II, p. 1827.) But in this he was badly mistaken.

Mr. Rainey of the St. Louis & San Francisco Railroad Company was of opinion that it would cost "three or four times as much" to do State freight business. And yet this witness proceeded upon the assumption that 90 *per cent of* the business on *way trains was State freight,* and that 40 *per sent of their entire tonnage was less than carload* (Record, Vol. II, p. 1843.) While we have seen that according to actual tests by Mr. Doddridge, *only* 4 *per cent of the way train* tonnage was *less than carload* (p. 1618), and that of carload freight only 37 *per cent was State freight* (p. 1589), and according to Peabody's tests, only 30.2 *per cent* of the tonnage of the *way trains* was State freight.

Mr. Miller, General Manager of the Wabash Company, said that the extra cost of doing State freight business in Missouri was practically the same on the Wabash, the Missouri Pacific and the Burlington railroads. (Records, Vol. III, p. 2831.)

He estimated that 25 per cent of the total ton miles of freight in Missouri was State business, while actual investigation made later on the Burlington (complainant's) road showed that the State freight percentage of ton miles was only 8.67 per cent (Exhibit 36, Record, Vol. II, pp. 1414-15), and a similar investigation on the Missouri Pacific showed the State freight ton miles to be only 13.98 per cent. of the whole. (Exhibit 19, Record, Vol. III, p. 2407.)

Mr. Miller thought the interstate business at Carrollton, one of the towns between division points on his own road, was a small part (Record, Vol. III, pp. 2865-6), while later investigation demonstrated that the interstate tonnage handled at that place was 5-6 as much as the State, or more than 45 per cent of the whole. (Record, Vol. III, pp. 2999-3001, Exhibit 28, Vol. III, p. 3362.)

He says that of the tonnage on the way trains the interstate freight is a small part (Record, Vol. III, p. 2268), and

his estimate of increased cost is upon the assumption that by far the larger part of it is State traffic (p. 2896).

How greatly mistaken he was upon this point has already been seen.

He did not know the average haul in Missouri of either class of freight (p. 2871). And he thinks it right to charge to the State business a large part of the expense of the local stations and their facilities, because, as he says, "only a very small part comparatively is interstate business at the local station" (Record, Vol. III, p. 2877), while subsequent investigation by the State's expert disclosed the fact that at five stations on his road (none of them division points), the interstate freight handled in September, 1906, was 60 per cent of the whole, or, deducting that part of the St. Charles tonnage, consisting of manufactured cars, it was 53.34 per cent of the whole. (Record, Vol. III, pp. 2999-3001, Exhibit 28, Vol. III, p. 3362.)

Mr. Miller estimated the average tonnage of his through trains at 750 *tons* each, and his way trains at not to exceed 100 tons each. (Record, Vol. III, pp. 2913-14.)

Mr. Miller was greatly mistaken.

Mr. Taliaferro, one of the State's experts, afterwards investigated the subject. The wheel reports for the through trains for the last ten days of September, 1906, were furnished to him by Mr. Forsythe, the railroad company's Superintendent of Transportation. He found that the average tonnage of one of those through trains for ten days was *only* 351 *tons;* of another one, *only* 246 *tons.* His testimony shows the loading of many others of the through trains during that period. The average tonnage of all of them was *only* 300 tons, instead of 750, as Mr. Miller thought. Those were eastbound trains.

He also investigated the westbound through trains. Their average tonnage was 270 tons.

And the average tonnage of all the through trains, both east and westbound, was 283 tons. He found no train that carried as much as 750 tons; the heaviest was 418 tons. (Record, Vol. III, pp. 3003-3007.)

A blueprint, known as "Summary of Operating Statisties by Accounting Divisions, for the year ending June 30, 1906," had been offered in evidence by the company (Record, Vol. III, p. 2912, Exhibit 12, p. 3336). It disclosed the average tonnage of all trains, way and through, for the year, over certain portions of the line, from which Mr. Taliaferro drew the irresistible inference that the average tonnage of the way trains must be at least 200 tons (Record, Vol. III, pp. 3011-12), instead of 100 tons, as estimated by Mr. Miller.

Mr. Tyler, General Superintendent of 2,000 miles of the St. Louis and San Francisco Company's mileage, thought 80 *per cent of the tonnage of way trains was State freight.* (Record, Vol. IV, p. 4136). And that of the freight handled on through trains, only from 1 to 3 per cent. is State business (p. 4137).

How far from the actual facts these estimates were, is discovered by Mr. Hamilton's investigation of through and way trains on Mr. Tyler's own road, the result of which are *that* interstate freight was just *twice* as much as State freight. (Record, Vol. IV, pp. 4607-17.)

And Mr. Tyler says that it is upon such estimates as these that he is led to his opinion as to extra cost (p. 4138).

Mr. Whitenton, who, for several years, was the superintendent of the Chicago, Rock Island and Pacific Railroad in Missouri, testified that on the revenue basis, it would cost twice as much to do State business as interstate; that is, it would cost about twice as much to earn a dollar. (Record, Vol. IV, pp. 4157-8.) This statement involved, of course, the consideration of the relative revenue derived from the two classes of business. But apparently unconscious of the

sublime paradox resulting, he says, almost in the next sentence, when asked about the relation between State and interstate rates on his road: "I don't know a thing about rates" (p. 4158).

Mr. McPherson of the Missouri Pacific Railway Company said that the relation of the State *less than carload* traffic to all the *State* traffic was greater than the proportion of *interstate less than carload* to the total interstate in the ration of about four to one on the ton miles basis of calculation. (Record, Vol. IV, p. 4292.)

Mr. McPherson doubtless believed this statement. And manifestly it was made to direct attention to the fact that the expense less than carload business was found in very much larger proportion in the State than in the interstate business.

That it is found in larger proportion is true. But that the proportion is not so large as Mr. McPherson supposed is also true.

On the Burlington road in Missouri, the percentage of less than carload State ton miles to the total State ton miles is 11.1 *per cent.* The percentage of less than carload interstate ton miles to the total interstate ton miles is 5.6 *per cent.* (Exhibit 36, Record, Vol. II, pp. 1414-15.) The State proportion of ton miles is, therefore, a little less than twice as large, instead of four times as large, as Mr. McPherson thought.

Upon Mr. McPherson's own road, the Missouri Pacific, the percentage of less than carload State ton miles to the total State ton miles is 13.7 per cent. The percentage of less than carload interstate ton miles to the total interstate ton miles is 5.3 per cent (Exhibit 18, Record, Vol. III, p. 2407), the State proportion of ton miles being only about 2.6 times as large as the interstate proportion, instead of four times as large as Mr. McPherson said.

Mr. McPherson said that in State carload traffic, the loading is lighter than in the interstate carload traffic. (Record, Vol. IV, 4330.)

But Mr. Doddridge made an examination of the business transacted at 88 stations upon Mr. McPherson's railroad, and produced a tabulated statement of the result, which was introduced in evidence by the Missouri Pacific Railway Company. (Record, Vol. II, pp. 1591, 1620, Exhibit 8; Vol. III, pp. 2390-2.) From this it appeared that the State carloads were the heaviest. State carload freight averaged 27 tons to the car, while interstate carload freight averaged only 22½ tons to the car. (Record, Vol. II, pp. 1881-2.)

These matters, in respect of which such glaring want of knowledge was thus displayed, are principal factors whose full comprehension and consideration are indispensable to any just conclusion upon the question of expense. Opinions ventured in the absence of such knowledge cannot be regarded as thoughtful estimates, but as mere haphazard conjectures without persuasive force.

III.

THE COMPARISON MADE BY COMPLAINANT'S WITNESSES IN EACH CASE IS BETWEEN THE EXPENSE OF WAY TRAINS AND THAT OF THROUGH TRAINS; NOT BETWEEN THE EXPENSE OF STATE BUSINESS AND THAT OF INTERSTATE.

The issue tendered by the complainant in each case is that it costs more to handle *State* than *interstate* freight. The evidence offered is *in* support of another and *entirely* different *question,* to wit, that a *way freight* train is more expensive than a *through freight train.* The record is crowded with—indeed, it is devoted to the recital of details, important and unimportant, substantial and trivial, real and fanciful, nothing within the range of the imagination being omitted, to show that the *way train* is more expensive than the *through train.* This evidence was offered and accepted in the court below as abundantly adequate to prove the issue that it costs, say three times as much to handle State freight as interstate freight.

Hundreds of pages of this kind of evidence were introduced by the complainant as if it were decisive of the issue; just as if the real issue were (as it is not) between "way train" and "through train," instead of being (as it is) between "State freight" and "interstate freight."

The success with which this confusion of issues, with which a studied substitution of an imaginary issue for the real one was attended in the court below, is one of the motives of this appeal; whose purpose it is to correct a finding upon a false issue and a decree based upon that finding.

It is true, that skillful methods of examination were able, from time to time, for a moment to obscure the fact, but the record as a whole shows clearly and unmistakably

that the dominant thought always first and foremost in the minds of the witnesses, and which they expressed over and over again, was the relative expense of the *way freight train* and the *through freight train*, and *not* that of State and interstate freight. For proof of the truth of this assertion, we appeal with unhesitating confidence to the record itself.

EVIDENCE OF HOWARD ELLIOTT, PRESIDENT NORTHERN PACIFIC.

Mr. Elliott said (Record, Vol. I, p. 427):

"Q. Has your service with the company enabled you to observe the relative cost of doing *local* and *through* business on the Burlington road in Missouri?

A. Yes.

Q. Is there, in your opinion, any difference in the cost of handling *local* freight and the cost of handling *through* freight?

A. Yes.

Q. What, in your opinion, is the relative cost or expense of handling the two businesses?

A. I think it is rather difficult to say exactly. I should say anywhere from three to six or seven time greater for *local* business as compared with *through*, depending on the class of the branch and the amount of business on the branch."

And then the witness proceeds, in response to an inquiry (p. 427), as to the elements "which enter into the extra cost of doing *local* business," says: "Another element is the fact that the so-called '*local*' or '*way train*' cannot be loaded to its full capacity * * * whereas, on the *through* business you get the maximum efficiency of your engine and train crew every time you move them" (p. 428).

Upon cross-examination, he said (pp. 430-1):

Q. Judge Spencer asked you if you were not familiar with, or if your services had enabled you to express an opinion as to the comparative expense between doing *local* and *through* freight business?

A. Yes, sir.

Q. You so understood the question?

A. Yes, sir.

Q. What do you mean by "local" freight business, Mr. Elliott?

A. I should call *local* business business that was picked up at a place like Hannibal and *peddled out from one station to another* in the State of Missouri, *or move on to a branch line.*

Q. Would you by that same term, and in your understanding of the question and the giving of the answer, also include such freight, for instance, as was taken from Des Moines, Iowa, and sent down on a branch line to Albany, Missouri?

A. Yes, sir; I should call that *local business.*

Q. Or such freight as was taken from Indianola, Iowa, and sent down to any point on either of those branches with which that connects. That would be *local business* according to your idea?

A. That would be my interpretation of it.

Q. And by *"through"* business you would mean business that was handled in what are known as *"through freight trains?"*

A. *Substantially that.*

Q. That is, by "through business" you would refer to shipments that would originate, say at Kansas City and end at Hannibal?

A. It might be going to New York.

* * * * * * * * *

Q. You will call business originating in Kansas City and ending at Hannibal or St. Louis, *carried on a through freight train*, "through freight business?"

A. Yes, sir.

Q. *And your testimony was given upon a comparison of the expense of handling the two classes of business that you have indicated you meant, in answer to my question?*

A. *Yes, sir.*"

And again (p. 439):

"Q. Your answer, as I took it down—and I tried to take it down exactly—was that the additional expense for handling *local* as compared with *through* business was from *three to six times as much?*

A. Yes, sir.

Q. That you have already explained was a comparison of *local* freight business with *through* freight business.

A. Yes, sir.

Q. Do you mean by the expense of handling a *ton of freight per mile in your local freight business, was three to six times os much as the expense of handling a ton of freight per mile in the through freight business?*

A. In a general way, yes."

And the fact that all the comparisons of expense which the witness had made were meant by him as comparisons between *local* or *way trains* on one hand, and *through* trains on the other, is emphasized and placed beyond dispute by his further testimony (p. 459):

"Q. Are you using *"through"* and *"local"* freight in the same sense that I have described them?

A. I don't know if we do or not. As I understood the objection that the counsel of the railroad interposed, they understood "local" freight to mean freight moved in Missouri.

Q. I am asking you about local freight without reference to whether it originates or ends in the State, and I understand you have been giving it the same meaning?

A. I am frank to say that I consider it local, even if it crosses the State line.

Q. There is no misunderstanding between us. *Local freight* is what is handled on *local freight trains.* And *through freight* is what is handled by *through freight trains, in your testimany?*

A. *Yes."*

EVIDENCE OF H. G. CLARK, DIVISION SUPERINTENDENT MISSOURI PACIFIC.

Mr. Clark offered his opinion upon the question of extra cost, and gave the reasons for his opinion, all of which pertained to the *way freight train* service and its incidents. His testimony upon these points has already been quoted from.

He then testified (Record, Vol. II, p. 1635):

Q. Before you pass from the item of cost by reason of the expensiveness of what you term the *way freight* trains, I understand that by that you mean that because *State freight* is carried in that kind of a train, therefore it would cost the company four or five times as much to do the State freight business as to do the interstate business?

Mr. Hagerman: That is not a fair assumption. Those are some of the reasons. You have not permitted him to tell all the reasons.

Mr. Kennish:

Q. Isn't that the reason, so far as the extra cost of the train in which the freight is carried is concerned?

A. *I am comparing the cost of the way freight train with the through freight train.*

Q. You assume that the *State* business, of course, is done on the *way freight trains?*

A. On the Missouri Pacific we have four classes of freight trains.

Q. Is that right? Were you using *way freight trains* as the trains upon which the State business was carried, and, therefore, the State business cost the company that much more *by reason of that fact?*

A. *Yes, sir.*

And again (p. 1637):

Q. You were speaking of *through* business as contrasted with the business done on the *way freight* trains, weren't you?

A. *Yes, sir.*

Q. You were dividing freight into those two general classes?

A. Yes, sir.

Q. *Through* business and that which is done on the *way freight trains?*

A. *Yes, sir.*

Q. And you give the reason why the business done on the *way freight* train would *be more expensive* to the company than that done on the *through freight* trains?

A. Yes, sir.

Q. *You speak then of State freight, of course, as being done on the way freight trains?*

A. *Yes, sir.*

Q. *And the through freight as being interstate freight?*

A. *Yes, sir.*

Q. Those are the two classes into which you would divide all the freight business done by the Missouri Pacific Railroad in the State of Missouri, and you say that the freight that is carried on the *way freight train* costs the company about four to five times more than the freight which is carried on the *through freight trains?*

A. *Yes, sir.*

And again (p. 1641):

"Q. Your opinion upon which you based the extra cost of the State freight as four to five times than what interstate freight cost, was *applicable to way freight trains entirely, as compared with through trains,* and assuming that the way train carried State freight and the through trains carried interstate freight?

A. *Yes, sir;* because if we had no State freight we would not have any way trains."

And again, on re-direct examination, he said (p. 1644):

Mr. Hagerman:

"Q. I presume there is some particular class of freight that costs ten times as much to handle as some other kinds. But the point I am getting at is, your estimate of four to five times, taking everything into consideration, is it applicable to the State freight as distinguished from the interstate?

A. I don't know that I understand you.

Q. Mr. Kennish asked you—

Mr. Kennish: I suggest that counsel let the witness state for himself.

The Master: The examination is quite leading.

Mr. Hagerman:

Q. My question originally was, how much more it costs to do the State freight business, as distinguished from the interstate: And you said four or five times more?

A. Yes, sir.

Q. Now, Mr. Kennish construes your meaning to be that you only meant it cost four or five times more to do the *way business* than the *through business* between these divisional ponits?

A. *Yes, sir; that is correct.*

Q. *Which is it you mean?*

A. The way business. It costs four or five times—I am making a safe figure for myself, though I can sit down and figure, as poor a figurer as I am, that it costs four or five times as much to handle this way business within the State than it does both classes of through business, interstate.

EVIDENCE OF HENRY MILLER, GENERAL MANAGER WABASH RAILROAD.

The fact that the witnesses, when they give opinions as to relative expense, have constantly in their minds the difference between the expense of way and of through trains, and that it is an opinion upon *that* difference which they really intend to express, is illustrated by the testimony of Henry Miller, General Manager of the Wabash Railroad Company. He had, until a comparatively short period before giving his testimony, been connected with the complainant's system in Missouri nearly all his life. (Record, Vol. III, pp. 2826-7.)

He also said that the extra cost was practically the same on the Wabash, the Missouri Pacific and the Burlington (the complainant) (p. 2831).

Mr. Miller, in his testimony already referred to, had said, in answer to a question by counsel for the Wabash Company, that "the business of Missouri would cost, to handle it, two or three times as much as the interstate or *through* business, as it is handled on the railroad." (Record Vol. III, p. 2829.) And then, being asked to "indicate the foundation of your opinion," he at once proceeds to specify the respects in which a "way train" is the most expensive, and among other things remarks (p. 2829): "I should say, by way of comparison, that a *local* train might average 100 tons where a *through* train would average 300 tons." He says "the *way freight* uses more time. They are usually scheduled at about half the rate of speed the *through freights* are." "It is necessary to have more frequent water stations, about twice as many, for the local trains as for the *through* trains."

Some parts of Mr. Miller's testimony seem inconsistent with others, but that in his mind the dividing line was between *way* and *through trains*, is apparent (p. 2854, Record).

> "Q. Then by through or interstate business' those terms are synonymous, are they. You do not include in through business any business that originates and ends in the State of Missouri, at all?
>
> A. *Yes, sir; it is handled in the through train.*
>
> Q. When you say that the business in Missouri costs two or three times as much to handle as interstate or through business, by the expression 'through business' you do not include any business which originates and ends in Missouri, do you?
>
> A. *Yes, sir.*

Q. You do?

A. Yes, sir. *I include that car you just specified, St. Louis to Kansas City.*"

And again Mr. Miller says (pp. 2850-2):

A. Yes, sir; but as a rule the through train has a full train of through freight. It does not occur very often that that train would set out a great many cars at Moberly.

Q. Do you mean by the *through train, a train that is loaded to its capacity with through carloads from Chicago to Kansas City?*

A. *Yes, sir.*

Q. That is what you mean.

A. Yes, sir; and the train is run because there is sufficient traffic to warrant its being run over it.

Q. A through train, as you have meant to express it here, means a train running from Chicago to Kansas City with an engine loaded to its full capacity, with full carloads of freight, all of it to go all the way to Kansas City from Chicago?

A. Full carloads—we have carloads and L. C. L. We have cars full and less than carload business.

Q. That is what I mean. The cars themselves would be full?

A. Yes, sir.

Q. The through train then has the same constituent or the same elements when it reaches Kansas City that it had when it left Chicago?

A. Yes, sir.

Q. There has not been any dropping out or taking on?

A. No, sir.

Q. *That is what you mean by a through train, is it?*

A. Yes, sir.

Q. Mr. Miller, when you speak of one kind of business costing two or three times as much to handle as another kind of business, you mean, I take it, that it costs two or three times as much *per ton mile?*

A. Yes, sir.

Q. You spoke this morning of a train which would be loaded at Chicago and go through to Kansas City intact, with the same freight unimpaired, or not enlarged or increased at Kansas City, that it had at Chicago; and you spoke of that as a through train. Now, *is it business on a train of that kind which costs one-half or one-third as much to handle as the State business?*

A. *Yes, sir.*

Q. It is business carried in a *train of that kind* constituted in that way, *which you mean when you speak of through business?*

A. *Yes, sir.*

Q. There is one train, from Chicago to Kansas City, I suppose the same would be true of a like train from Kansas City to Chicago. That would be on the same principle?

A. Yes, sir.

Q. Both of those trains go clear across the State, that is true?

A. Yes, sir.

And again, in giving the reasons for his opinion that the cost of through business on a train from Buffalo or Chicago to Kansas City would be only one-third or one-half that of the State business, and he immediately proceeds to enumer-

ate the particulars in which the *way freight train* is more expensive, because it is those things, and those things only, which influence him to his opinion. He has no other reasons. In his mind, even present, the two opposing factors are the *way train* and the *through train* (pp. 2860-1).

"Q. You said that, in your opinion, the State business in Missouri would cost two or three times as much to handle as the *through business, on this Buffalo and Chicago train,* that you mentioned a while ago, those six trains. Can you offer any evidence in support of that opinion?

A. Only the instance I cited yesterday that these trains that do the State business carry a very light tonnage, comparatively.

Q. I am asking you if you can offer any evidence.

A. No, sir. My statement was based on experience, you cannot state in any particular, constituting any one of the particulars which constitute the whole work of doing the business, you cannot state approximately how much more in that particular it costs per ton mile than it does to do this through business, between Chicago and Buffalo on the one hand, and Kansas City on the other hand?

Q. You said two or three times. Then it would be eight or twelve mills?

A. Yes, sir.

Q. That is the result of it. But can you produce any figures or the result of any tests to justify your opinion?

A. No figures. It is one of these things that a man learns by experience, and you cannot rub out the experience.

Q. *Will you give your reasons for the extra expense; of what does the extra expense consist?*

A. The first item is wages.

Q. Wages of what?

A. Everybody connected with the handling of the freight.

Q. I would like to be as definite as I can, that is pretty broad.

A. Train men, engine men, station men; and in the maintenance.

Q. Maintenance of what?

A. Maintenance of the equipment and of the road. Because you have to maintain for these *local trains* the same main track and passing tracks that you maintain for the *through trains.*

Q. What is that, Mr. Miller?

A. You have to maintain for the *local trains* all the things you have to maintain for the *through trains,* and in addition you have the sidings for *local business,* including elevated tracks, stockyards, warehouse facilities, and the labor cost.

Q. What do you mean by 'labor cost?'

A. Whatever freight handling you have, and clerical force.

Q. Aren't your freight handlers included in your station men?

A. Yes, sir.

Q. That is included?

A. Yes, sir.

Q. What else?

A. A locomotive is practically used *on a local train* going over one division, twenty-four hours. On the *through trains* that same engine can easily make a round trip. The *local train* hauls about one-

third of the capacity of the engine, and the *through train*, as a rule, is loaded to the full capacity. The *local trains* having to do the switching, loading and unloading of freight at stations, make a great deal of overtime, something which seldom occurs to a *through train*. One hour's overtime on a train means an increase of ten per cent. in wages. It is not infrequent that they get in two, three or four hours overtime on those trains. In picking up stock, the shipper sometimes has not his shipment at the station, it is on the way, or he has just arrived, and the train has to wait. All those things get into the cost. It is necessary to maintain more water stations for the trains *doing local work* than it is for the through trains. The *local trains use more coal*, too. And supplies of every kind. The *local business* is re-handled more or less; at unimportant stations less than carload business in the warehouse and carload business in the yard; all of which adds to the cost."

EVIDENCE OF W. T. TYLER, DISTRICT SUPERINTENDENT S. LOUIS & S. F. R. R. CO.

Mr. Tyler had testified that the cost was three to five times as much. (Record, Vol. IV, p. 4101.)

But on his cross-examination he testified explicitly, in language that can have no other meaning, that his comparison was really between the expense incident, respectively, to *way* and *through trains*. (Record, Vol. IV, p. 4138):

"Q. When you come right down to what we might call 'scientific accuracy,' *you really don't mean the relative cost between State and interstate at all*, but you really mean the *difference between through and local?*

A. *Yes.* The interstate feature does not interfere with it. *It is 'through' or 'local' wholly.*

Q. And you rely on what you assume with respect to the through and local and State and interstate very largely because you assume that the through is mostly interstate, and that the local is mostly State?

A. That is the idea, yes.

Q. And while there is not an exact identity between them there is perhaps a substantial identity?

A. Yes.

Q. But strictly speaking, you *make your differentiation between through and local?*

A. Yes, between through and local freight and with reference to long and short hauls.

Q. That again comes to through and local very largely?

A. Yes.

Q. *And all your statistics that you have and* then the special observations you make *have reference to through and local rather than to State and interstate?*

A. *Yes.*"

EVIDENCE OF CHARLES STURGIS, AUDITOR OF BURLINGTON.

Mr. Sturgis answered upon that subject, as follows:

Q. Including those and all other expenses that you know of, what, in your judgment, would be the relative cost of *local business* as compared with *through business?*

A. *From three to seven times.*

EVIDENCE OF J. G. RAWN, GENERAL MANAGER ILLINOIS CENTRAL RAILROAD COMPANY.

Mr. Rawn said (Record, Vol. 1, p. 568):

"A. In my experience and the basis upon which we predicate our cost of operation, the cost of handling *local freight*, as we term it, in comparison with that which we term *through freight*, and in accordance with out statistics in the matter, we find that the direct train cost for exclusive train operation, which I shall endeavor to deal with as one item, and with other items separately—*the direct exclusive train cost*, of that which we term *local freight*, is about *three and a half* times that of handling *through freight*. That is, I reiterate, what we term exclusive train cost, or direct train cost."

Mr. Rawn declined to express any opinion as to the relative expense of handling State and interstate freight.

IV.

A COMPARISON OF THE WAY TRAIN WITH THE THROUGH TRAIN DISCLOSES THAT THE FREIGHT IN THE WAY TRAIN IS OVER 65 PER CENT INTERSTATE AND LESS THAN 35 PER CENT INTRASTATE; AND THE FREIGHT ON THE THROUGH TRAIN IS 85 PER CENT INTERSTATE AND 15 PER CENT INTRASTATE.

(a)

As the finding of the court relative to the division of expenses between State and interstate freight was necessarily based on the assumption that the *way train* was three to eight times as expensive as the *through train*, and that the *way train* simply hauled *State freight* and the *through train interstate freight*, and that, therefore, the State freight account should be charged with *three times* the amount of expense per ton charged to interstate freight.

It so happens that during the trial of the cases actual tests were made upon a number of occasions as to the way freights and through freights, both by the railroads and the State. The result of these *actual tests* completely overthrows the finding of the court and its action in charging State freight with three times the cost per ton charged to interstate. The actual test discloses that about *two-thirds* of all the freight in *way trains* is *interstate* and one-third intrastate. That about 85 per cent of all the freight in through trains is interstate and 15 per cent is *intrastate*. So we find, that the *interstate* freight is carried in this *costly way train*, and that State freight is carried in that cheap through train. Preliminary to an examination of the actual tests we will see how the through freight train and the way freight train operate.

(b)

HOW THROUGH AND WAY FREIGHT TRAINS OPERATE AND THE CLASSES OF FREIGHT CARRIED BY EACH.

The *through* freight trains, pass over a complete division of the road, and the *way freight* trains operate between division points. (Record, Vol. I, p. 497.)

The division points upon complainant's main line of railroad in Missouri, are at St. Louis and Hannibal, on the Mississippi river; Brookfield and Cameron, in the interior; and Kansas City and St. Joseph, on the Missouri river. (Vice-President Willard's testimony, Record, Vol. I, p. 498.)

Interstate freight originating between division points in Missouri, is hauled by the *way train* to the nearest division point. (Willard's testimony, Record, Vol. I. p. 505.)

Interstate freight originating out of Missouri and destined to stations in Missouri between division points, is hauled on a *through train* to the nearest division point, and there is put into a *way train* for distribution and delivery at its places of destination. (Willard's testimony, Record, Vol. I, pp. 505-6.)

Bethard's testimony, Record, Vol. II, p. 1830.

Testimony of Mr. Miller, General Manager of the Wabash Railway. (Record, Vol. III, pp. 2847-50, 2853-4, 2856.)

So not only is interstate freight thus handled on the *costly way train;* it is also the fact that *State freight is hauled on the cheap through train.*

State freight, loaded at a division point whose destination is beyond the next division point, is placed in a *through* train and hauled as far as the next division point in that train; its immediate neighbor in the train may be a carload of interstate freight from Boston, having the same destination. These two cars will, in the same manner, leave the through

train at the division point, there to take their place in the *way train*, and proceed, in that *way train*, to the station of their destination, where they will be placed upon the same unloading tracks, perhaps still joined together by their original coupling. The treatment accorded to those two shipments, both in the *through train* and in the *way train*, and the expense incident to that treatment, are precisely the same. (Willard's testimony, Record, Vol. I, p. 506; Bethard's testimony, Record, Vol. II, p. 1828; Miller's testimony, Record, Vol. III, pp. 2848, 2855-8; Smith's testimony, Record, Vol. II, p. 1516; Doddridge's testimony, pp. 1611-12, 1615-16, 1582.)

And less than carload freight of both classes, State and interstate, are found *in the same car*. (Taliaferro's testimony, Record, Vol. I, p. 899.)

That what are called the *expensive way trains haul interstate as well as State freight, and that State freight is transported on through trains,* is not disputed by any witness whose attention is directed to the subject. But this important fact is persistently and studiously kept in the background, and the extra expense of the *way trains* (greatly magnified, as we think) is dwelt upon with much elaboration, and erroneously dealt with as a feature for which the *State traffic is wholly responsible*. Whenever a witness who has expressed an opinion that the handling of State freight costs relatively the most, is required to give the reasons for his opinion, he promptly enters upon a recital of the items of expense incident to the operation of a *way train* and to the maintenance of the facilities necessary, in his opinion, for its use.

A concerted attack has been made by railroad officials upon the way train which is regarded by them as almost an object of contempt. It is a constant trial to them. It is the black sheep of the family, the pariah of the railroad system, its hewer of wood, its drawer of water.

The fly in the ointment of the railroad operator's hap-

pliness is the *way train;* the ball and chain at the heel of his successful management, is the *way train;* of all the evils which beset railway administration, the *way train* is the crying one; and we are asked to believe that the State traffic is, virtually, the sole cause of its being, and that all the calamities flowing from its vexatious existence should therefore be charged to the account of that traffic.

We are to regard the existence of the *way train* as tolerated, only because required by law, and therefore a necessary but disagreeable incident of railroad operation. The great through *train* is the favored one, whose *just burdens* the complainants would, in this litigation, cast upon its more humble associate. But if there were no local trains, no local business, there would be no through trains, no through business. The through train never would have been heard of, it would not have been born, it could not live a moment were it not for the way train. Indeed, the way train is the breeding and nursing mother of the through train. The local business is the foundation upon which the vast superstructure of through business rests. It furnishes all its constituent elements. It is the numberless little rills of local traffic, having their sources at the towns and villages and hamlets and cross-roads all over the country, which, gathering together and carrying the products of the farm and the forest, the shop and the mine, converge here and there and create the mighty river of through traffic. They are, in fact, the essential prerequisite to the existence of that river.

It is important, therefore, to ascertain, if possible, whether it be a fact that this undesirable feature of railway operation is maintained and the great expense thereof incurred for the benefit of the State business, as is claimed. If the fact be that it is in part maintained for the benefit of the interstate business, then the entire additional expense ought not to be charged to the State business. If it be a

fact that it is maintained largely for the benefit of the interstate business, it follows that the larger share of the much exploited extra expense should be borne by that business. Obviously it is, in this immediate connection, of much consequence that the trier of fact be informed whether all the freight carried on these way trains was State freight, and if not, and a part of it was interstate freight, how much of each, or the relative proportion of each; informed, not as a matter of opinion or conjecture, *but as a matter of fact*. Obviously also, it was incumbent upon the complainant to produce evidence of that fact. Obviously, also, it was in its power, and practically in its exclusive power, to produce that evidence. But this record will be searched in vain for any testimony adduced by the complainant as to the proportion of State and of interstate freight transported upon its way trains.

But, notwithstanding the silence of the railroads upon this point, notwithstanding this apparent confidence that opinions will be accepted as a sufficient substitute for facts, this record does afford convincing evidence, sometimes unwittingly furnished by the associates of the complainant in each case in this litigation, sometimes by actual tests made by the experts for the State, that a very large proportion of the freight carried upon the way trains is *interstate freight*. Some of that evidence will now be referred to.

(c)

FREIGHT CARRIED BY WAY OR LOCAL TRAINS IS TWO-THIRDS INTERSTATE FREIGHT.

Mr. W. B. Doddridge was a witness in the case of the Missouri Pacific Railway Company, and also in this case. He had large railroad experience. From 1893 to 1900 he was General Manager of the Missouri Pacific Railway system. (Record, Vol. II, p. 1569). At the time of giving his first evidence (January 16, 1907, he was, however, en-

gaged in other business (p. 1597). He had been an attentive listener to the evidence at nearly all the hearings in these cases before he gave any evidence himself (p. 1597). He was apparently regarded as one of the chief witnesses for the complainants in these cases. Indeed, he was recalled to the witness stand by the complainants no less than seven times. Mr. Doddridge gave lengthy, interesting and instructive disquisitions upon the subject of railway management, and his testimony threw much light upon some of the questions involved in this controversy.

It is to be gathered from his testimony that in his opinion, if the business of the Missouri Pacific Railway Company could be confined to a dozen through daily trains each way, between St. Louis, Missouri, and Pueblo, Colorado, each train composed of cars loaded with carload freight and as many of them as the engine could haul, stopping only to change engines and train crews, or for water or fuel, whistling in derision through the cities and towns and villages of Missouri and Kansas, on their way, an ideal situation would be realized. In his opinion, all trains but such as these are deplorable, but necessary evils. All other trains increase the expense and reduce the net revenue of the company. And, in his opinion, this increase of expense, this reduction of net revenue, is to be ascribed to these way trains, and, therefore, be necessary corollary, to the freight which has its origin and destination within the boundaries of the State. But the supposed corollary is, in fact, a *non sequitur,* because his own tests show that *much the larger part of the freight carried upon these way trains is interstate freight.* It is true that these tests were made by him and offered in evidence for another purpose, but incidentally they do clearly show this fact.

(d)

DODDRIDGE TEST.

In December, 1906, Mr. Doddridge examined the contents of six *way freight trains* on the Missouri Pacific Railroad. (Record, Vol. II, pp. 1589-90.) By far the larger part of the tonnage on these trains was in carload lots, only a little more than 4 per cent of the whole being less than carload freight (pp. 1618, 1621). The carload freight on these trains was about 96 per cent of the whole, and of the 96 per cent *only* 37 *per cent* was *State freight*, while 63 per cent was *interstate freight* (pp. 1589, 1621). There was 70 *per cent more* interstate than State freight.

He said these six *way trains* carried an average tonnage of 175 tons (pp. 1589, 1621.) If 4 per cent of this (7 tons) be deducted for less than carload freight there remains in the train 168 tons of carload freight; 63 per cent of it, or 105 tons, is *interstate freight*, leaving only 70 tons of State freight, even if all the less than carload freight be treated as State freight.

But this is not all. Mr. McPherson, assistant to the General Manager of the Missouri Pacific Railway Company, testified (Record, Vol. IV, p. 4295), that the average haul of interstate freight on his road in Missouri was 105 miles, and the average haul of State freight was 52 miles. Multiply 63 (the interstate percentage of freight on these way trains) by 105 and we have 6615; multiply 37 (the State percentage) by 52, and we have 1924.

The ton miles of freight hauled by this way train would then be in the proportion of 6615 interstate and 1924 State; the interstate being 3 2-5 as many as the State, and the train therefore performing 3 2-5 times as much service for the interstate as for the State business.

The tabulated statement regarding the six local trains, prepared under the supervision of Mr. Doddridge, was offered as Exhibit 14, and is found in Vol. III, p. 2400. But subsequently a clerical error was discovered in it, which was corrected (Record, Vol. II, p. 1914), and the corrected table is in Vol. III, p. 2401.

Mr. Doddridge had testified from this statement (Record, Vol. II, p. 1589), that of the less than carload freight carried on these trains, only 7 per cent was interstate, and that 93 per cent was State freight. The corrected statement shows that 14 per cent of this class of freight was interstate and 86 per cent State.

And of the total tonnage of these six *way trains*, 59 per cent was interstate and only 41 per cent State freight (Exhibit 14, Record, Vol. III, p. 2401); Ludlam's testimony, Record, Vol. I, p. 1159).

(e)

HAMILTON TESTS.

Mr. Hamilton, under the direction of the experts for the State, made certain investigations covering freight trains upon the St. Louis and San Francisco Railroad. The performance of the trains on July 17, 1907, was examined. That date was selected by the superintendent of transportation of the railroad company on the basis of its tonnage and ton mileage. (Record, Vol. I, p. 4608.) Mr. Hamilton's testimony, detailing the results of this examination, is found in Vol. IV, pp. 4608-17. His information was obtained from the wheel reports and waybills of the company.

He ascertained the relative tonnage of State and interstate freight on eight way freight trains running on the Memphis division on that day, four of them being northbond and four southbound.

In the four southbound trains there were:

State carloads, 270 tons.

Interstate carloads, 546 tons.

Less than carload freight, 70 tons.

(Record, Vol. IV, pp. 4614-15.)

The carload *interstate tonnage was twice as great* on these *way trains* as the State carload tonnage (p. 4615).

The less than carload freight was not classified between State and interstate, as it was impracticable (p. 4613).

The total tonnage on these trains was 886 tons, and the less than carload freight was less than 8 per cent of the whole.

The four northbound carried, State carloads, 1,306 tons and 603 tons interstate.

He also investigated three *through trains.* The total tonnage was State, 15 per cent; interstate, 85 per cent (pp. 4610, 4613, Record).

Mr. Hamilton also investigated six *way trains* between St. Louis and Monett, which had run on the same day.

On these the State carload freight was 476 tons.

The interstate carload freight, 471 tons.

Less than carload freight, 216 tons.

(P. 4617.) On these trains the State and interstate carload freight was *about equal.*

He also examined the results of the operation of sixteen through trains between St. Louis and Monett.

The State carload tonnage was 366 tons.

The interstate carload tonnage was 2,639 tons.

Less than carload freight, undivided between State and interstate, 992 tons (p. 4617).

Consolidating these sixteen through trains with the other through trains examined and investigated, the result is that 11.6 per cent was State carload freight.

(f)

PEABODY TESTS.

Mr. Peabody, the statistician of the Atchison, Topeka and Santa Fe Railroad Company, was a witness on behalf of the complaint. (Record, Vol. IV, p. 4404.) He gave his testimony December 18, 1908.

For the purpose of making some calculations as to the relative cost of State and interstate freight business, he caused two tests to be made on the line of his company in Missouri; one was from November 18 to November 24, 1908, and the other from November 30, to December 6, 1908. His tests covered every freight train, both through and way, running on the line during those periods (p. 4419), 123 through appeared in certain tables prepared by him; one, Exhibit 41 (Record, Vol. V. pp. 4935-6), and the other, Exhibit 42 (Vol. V, pp. 4937-8).

Although the tests were made and the exhibits prepared for quite a different purpose, they incidentally contain valuable information bearing upon the question now under discussion.

From Exhibit 41, which is applicable to his first six-day period, it appears that the *way trains* carried freight, as follows:

State freight, 863 tons; interstate freight, 2,024 tons. On these *way trains*:

The State freight of the whole freight is..... 29%

The interstate freight of the whole freight is... 71%

The State freight carried on through trains for the same period was 1,905 tons, and the interstate carried was 38,799 tons. Thus, there was more than twice as much *State* freight (1,905 tons), carried on the *cheap through trains* than was carried on the *expensive way trains* (863 tons).

Mr. Peabody's Exhibit 42, covering the second six days period, showed that the way trains carried, in tons:

State freight, 892 tons, and interstate freight, 2,039 tons.

The *State* freight was only 30.4 *per cent* and the *interstate* freight waas 69.6 *per cent.*

The *State* freight carried on *through* trains for the same period was 1,511 tons, and *interstate* 29,202 tons. Nearly twice as much *State freight* (1,571 tons), was carried on the *cheap through trains* as was carried on the *expensive way trains* (892 tons).

Combining the results of the two Peabody periods we have the following:

(1)

Through trains carried in tons, State freight....	4.8%
Through trains carried in tons, interstate freight	95.2%
Way trains carried in tons, State freight.....	30.2%
Way trains carried in tons, interstate freight..	69.8%

Of the *entire State freight* carried during these test periods only 34 *per cent* of it was carried by *way trains,* while 66 *per cent* of it was carried by *through trains.*

From these tests and actual facts, we have the following indisputable results:

1. That the greater part of the freight carried on the *costly way tarin* is *interstate freight* (from 50 to 65 per cent).

2. That the greater part, by far, of the *total* volume of *State* freight is carried on the *cheap through trains.* (About twice as much.)

By the facts do we condemn the finding of the court. By the evidence of the road's officers, who were *long* on opinions and short on facts and information, do we show that the greater part of the freight on the way train is interstate and

not State freight, and the greater expense is chargeable to interstate expense and not State.

Again, every pound of *interstate* freight received at or shipped from the towns and stations on the branch lines is transported on the *way train,* because on these branch lines there is no through train The cattle and hogs, the grain and other products of the fertile territory whose first market is at one of these towns or stations, and from them are shipped to Chicago or other large markets outside the State, find their way to the main line of the railroad and to the great through trains only by means of the *way train.* (Doddridge's testimony, Record, Vol. II, pp. 1581, 1615.)

On all such lines the *entire interstate* freight is carried by this costly way freight, because there are no through trains run on them (pp. 499, 1962, Record).

CONCLUSION.

In the final analysis we find the *greater part* of the *State* freight is carried in the *cheap through trains,* and that the *greater* part of the freight carried by the *costly way freight is interstate.* So we must charge interstate commerce with the greater part of the expense of operating the way freight, in fact, it must be charged with two-thirds of the expense chargeable to the way freight.

We find, also, that the greater part of the entire volume of State freight is carried by the cheap through trains. Actual conditions are just the reverse of those found by the court, and just the reverse of what the complainants' witnesses wished or expected. The court, therefore, has made the State freight traffic bear an expense chargeable to interstate traffic.

The interstate freight has attempted to beat its way, hobo fashion, in the way trains, and have the State freight

account bear the expense. Not satisfied with that, it even attempts to have the State freight account bear three times over an expense chargeable only to interstate freight. It has not only sought to be carried free, but to, at the same time, gather the revenue from the transit and place same in the net earnings account of interstate traffic, thus cutting two ways by compelling the State freight to carry it free and, at the same time, robbing the State freight account of the revenue for the transit.

It is also true that it costs more (pp. 872, 898-9 and 3022, Record) to handle *interstate* less than carload freight than it does *State* less than carload freight. The complainant falls before this array of facts, figures and evidence.

IV.

TON MILE AND PASSENGER MILE PROPER BASIS.

TOTAL EXPENSES SHOULD NOT HAVE BEEN DIVIDED BETWEEN STATE AND INTERSTATE TRAFFIC UPON THE BASIS OF GROSS EARNINGS. AS TO FREIGHT TRAFFIC IT SHOULD HAVE BEEN DIVIDED ON THE TON MILE BASIS AND AS TO PASSENGER TRAFFIC ON THE PASSENGER MILES AND SERVICE RENDERED.

A.

The paramount question is, how should the expenses of doing State and interstate business be divided? How much of the expense is to be apportioned to intrastate traffic, and how much is to be apportioned to interstate traffic? The complainant in each case did not keep the costs or expense of handling State traffic separate from interstate traffic, and has left it to guess or hazard as to how the expense should be divided. It has failed to make a full disclosure and tell the Court, and has utterly failed to make any proof of probative force as to the expense assignable to each class of traffic.

The average revenue received by complainant in each case per ton per mile for State freight traffic is more than twice as large as the average revenue received upon interstate freight traffic per ton per mile. The State contends and it is the correct position that the expense for handling the freight traffic should be divided according to the cost per ton per mile to move it, and the expenses of the pas-

senger traffic must be divided upon the two factors of passenger miles and service rendered. The cost per ton per mile is ascertained in each class of freight entirely irrespective and regardless of the revenue derived from the service. To reach that cost as nearly as possible was the effort and aim of the experts for the State.

TON MILE THEORY.

To divide expenses on the ton mile theory you multiply the number of tons by the number of miles moved, which gives you the total number of ton miles. You do this as to both the intrastate freight and interstate freight separately. You divide your total freight revenue by your total number of ton miles and you thus get the revenue per ton mile. You then divide your total expenses by your total number of ton miles and you get your cost per ton mile. Knowing the number of intrastate ton miles and interstate ton miles you get the cost or expense for handling each class by multiplying the number of ton miles in that class by the expense per ton mile.

It is easily illustrated in the following assumed case. Say the Santa Fe railroad hauls one hundred tons of intrastate freight ten miles and also hauls two hundred tons of interstate freight ten miles with no terminal charges, etc. Say the State rate per ton and the interstate rate per ton are the same, and the expenses of each class per ton are the same, both factors being even, and the revenue received for both hauls is $300.00, and the expenses for both hauls is $210.00. The expenses would then be for hauling the State freight $70.00 and for the interstate freight $140.00. This result is obtained as follows:

One hundred tons intrastate freight moved 10 miles give	1,000 ton miles
Two hundred tons interstate freight moved 10 miles gives	2,000 ton miles
Total ton miles	3,000
Revenue received for moving both State and interstate freight	$300.00
Expenses for moving both State and interstate freight	210.00
Revenue per ton mile is (divide $300 by 3,000)	.10
Expense per ton mile is (divide $210 by 3,000)	.07
Net profit per ton mile is	.03
Expense assignable for moving State freight is multiply 1,000 by .07)	$70.00
Expense assignable for moving interstate freight is (multiply 2,000 by .07)	140.00
Total expense	$210.00
Net profit on moving State freight is (multiply 1,000 by .03)	$30.00
Net profit on moving interstate freight is (multiply 2,000 by .03)	60.00
Total net profit	$90.00
Total expense for moving both classes	$210.00
Net profit for moving both classes	90.00
Total	$300.00

DIFFERENCE IN DIVIDING THE EXPENSE OF HANDLING STATE AND INTERSTATE TRAFFIC UNDER THE REVENUE THEORY AND THE TON MILE THEORY AS APPLIED TO THE EXAMPLE UNDER THE FACTS IN THESE CASES.

It is conceded that the State rate in these cases is twice as high as the interstate rate, in other words, the revenue collected is twice as much per ton on State traffic as it is on interstate traffic. Therefore, in applying the facts in the case to the example on the revenue theory we will figure same with the State rate at fifteen cents per ton and the interstate rate at seven and one-half cents per ton.

1,000 tons State freight at 15 cents per ton..... $150.00
2,000 tons interstate freight at 7½ cents per ton.. 150.00

Total revenue $300.00

The revenue, then, is $150.00 on State freight and $150.00 on interstate freight. The expense was $210.00. On the revenue basis the expense would be half and half. One-half of $210.00 is $105.00. The expense assigned then to the State freight is $105.00, and that assigned to interstate would be $105.00. But under the ton mile basis we have found that the expense of moving the State freight was only $70.00 and that of moving interstate freight was $140.00. So the difference between the ton mile theory and the revenue theory as to the division of expense under the actual facts applied to the example increases the expense to the State freight $35.00 and relieves the expense of interstate traffic $35.00.

Now, if you apply the court's finding that it costs 50 per cent more to handle the State freight than to handle interstate freight, or what is the same thing, three times as much, you would divide the $210.00 expense in the follow-

ing way: As the State revenue under the revenue basis is $150.00 and the interstate revenue is $150.00, or half and half, you can represent each by 50. Now, three times 50 is 150, which represents the State's proportional part of the expense and 50 represents interstate's proportional part; 150 plus 50 equals 200; 200 then represents the denominator. The State's part of the expense on the revenue basis would be 150-200 part of $210.00 or reduced would be three-fourths of the $210.00, which is $157.50. The interstate's proportional part of the expense would be 50-200, or one-fourth of $210.00, which is $52.50. Now the State traffic expense under the ton mile theory was $70.00. Under the revenue theory with the State rate twice as much as the interstate rate and with the court finding that it costs 50 per cent more, or three times as much, to handle the State freight as the interstate freight, the expense chargeable to State freight is $157.50. In other words, the revenue theory under the actual rate plus the 50 per cent extra cost for State freight found by the court has increased the expense assignable to State traffic $87.50 and the interstate expense has been relieved of the difference between $140.00 and $52.50, which is $87.50. This serves to illustrate the great injustice imposed by the revenue theory upon the State traffic and the expense which interstate traffic escapes unjustly. The change in a rate does not change the expense. It has no effect on expenses. To use the "revenue basis" both the rate and expense per ton would have to be the same, thus giving even factors.

The State and its witnesses wholly rejected the "gross revenue theory" adopted by the trial court and affirmed that the ton mile theory was the only test which took into consideration the actual facts and every element of cost. This theory takes into consideration all the facts, the amount hauled, the weight and the distance moved, etc.

It is the unit which is the same in all cases. A unit for every comparison. It takes into consideration every element, no matter whether waste space, length of haul or empty cars. It is used by all railroads and is the one unit which will apply with equal justice to every class of freight. It has been recognized, not only by the railroads themselves, but by the courts, and is the one which meets with justice and with reason. The State's witnesses declared it to be the only basis for the division of expenses, and the railroad's witnesses and officers in this case in most instances were forced to acknowledge it.

B.

STATE'S WITNESSES AND ACCOUNTANTS AFFIRM CORRECTNESS OF TON AND PASSENGER MILE BASIS FOR DIVISION OF EXPENSES.

The expert witnesses upon behalf of the State were Charles Ludlam, A. P. Taliaferro and P. A. Hamilton, men of integrity and known ability. They were and had been long connected with the well known firm of Haskins & Sells, chartered accountants of the city of New York, with offices in other important cities. Each of them had enjoyed practical experience in the operation of railroads. Mr. Ludlam and Mr. Taliaferro had the advantage of a very large personal experience in the methods pursued by railroad companies in the keeping of their accounts, resulting from their regular examination and audit of the accounts of some of the most extensive railroad systems in the country. Their time and that of their assistants was occupied for months in the investigation of the accounts of the railroad companies parties to the litigation and of their method of handling business. They made the situation the subject of prolonged, serious and intelligent study. Facts testified to by them were the result of actual investigation. Opinions offered by them were based upon these facts and upon their knowledge of railroad operation gained by previous experience and close observation of the general methods and the details of railroad management pursued by the leading railroads of the country and as discovered by them in their examination of the accounts of those companies. This was besides their information obtained by employment in this case, and their examinations made in this case.

The qualifications of Mr. Ludlam for this work are stated in printed record, pages 852-6 and 939-41 and 852-7 and 2210-12 and 3034-8.

The qualifications of Mr. Taliaferro are stated in printed record, pages 880-90 and 2188-90 and 2203-5 and 2950-3.

The qualifications of Mr. Hamilton are stated at pages 1064-7 and 2168-70, printed record.

It is not too much to say that considering their qualifications, their fitness for the work, the knowledge of actual facts acquired by them; considering their testimony in this case, not only as respects its substance, but the intelligence, fairness and candor with which it was given, the opinions of Mr. Ludlam and Mr. Taliaferro upon this important question are entitled to the gravest consideration.

They presented their views in respect to this important question, giving the reasons why, in their opinion, the expenses should not be divided upon the basis of the gross revenue and also the reasons why, in their opinion, the only correct method of ascertaining the expenses of the State freight business was to determine as nearly as possible the cost per ton mile of handling such business.

Their evidence and logic and reason and the facts upon which they are based are so convincing and so conclusively settle the fact that we take some extracts from their evidence and as given in their own language.

EVIDENCE CHAS. S. LUDLAM.

Mr. Charles S. Ludlam testified (Record, Vol. I, 1160-1):

> "Q. Mr. Ludlam, I will get you to state, from your experience, both your connection with railroads and railroad accounts, and your experience as an accountant and auditor of accounts, including your experience in the exmination of the books and papers of the Wabash and the Missouri

Pacific railroads for the purposes of this litigation. What unit, in your judgment, affords the closest approach to accuracy, as to either cost or revenue in the handling of freight?

A. In my judgment the best unit known, and I think it is *generally so recognized among railroad men, is the per ton per mile unit.*

Q. Some of your exhibits here, at least some of them, are based upon the ton mile, both as to cost and earnings as the unit. Is that the reason you have taken that as the basis of a number of these computations, that you regard it as the best attainable basis to work on in ascertaining cost and revenue?

A. Yes, sir.

Q. Do you know, from your experience and associations with railroad managers and railroad accountants, and your auditing of railroad accounts, the accounts of other railroads, whether that is a recognized and approved unit in railroad circles?

A. *That is the generally recognized unit, yes, sir.*"

On pages 1170-2, printed record, he said:

"A. I would like to make that very clear—and I do not think I can make it too clear—*that the revenue has no possible relation to the cost.* It costs the company just as much to haul a ton of sugar a mile in Missouri, whether that sugar originates in St. Louis or whether it originates in New York. And the revenue in Missouri is twice as much for hauling it that mile as the revenue on the sugar that originates in New York that is hauled one mile in Missouri. But the cost of actually haul-

ing that ton of sugar a mile is the same in both cases. And the mere fact that the revenue is twice as much in one case as it is in the other case does not in any way affect the cost per ton.

Q. *That is to say, in ascertaining the cost, the question of revenue should not enter into it, in your judgment?*

A. *Absolutely not.*

Q. The cost has nothing to do with the revenue.

A. They are two separate and distinct factors. Cost has no more relation to revenue than any two things that are entirely separate and distinct.

Q. So if it actually costs, on any theory you figure it out, three times as much to do the State business as to do the interstate business, it should not be considered so far as it affects the question of revenue?

A. The revenue may be ten times as much, but they have no relation to each other.

Q. *The cost must be determined as something separate and distinct and apart from the revenue?*

A. Unquestionably. I would like to illustrate that by a little example I have here.

If you take two tons of freight, each one moving a mile, and one of those tons is State freight, and, for the purpose of illustration we will assume it earned ten cents for moving that mile. The other ton is a ton of interstate freight, which was moved one mile, and we will assume that it earned five cents for moving that mile. That would make your total earnings fifteen cents. The expense, we will assume, for hauling those two tons one mile, both tons of freight being of the same class, would cost

identically the same, say ten cents. If you take that expense of ten cents, however, and divide it on the basis of revenue, you would apportion two-thirds of the total expense against your ton of State freight, or six and two-thirds cents, because the State freight earned two-thirds of the total revenue of fifteen cents. And if the total expense was ten cents, and you apportioned it on the basis of revenue, you would apportion two-thirds of the expense to the State business, which would make the expense for hauling that ton of State freight six and two-thirds cents, as compared with the expense of hauling that ton of interstate freight, three and one-third cents.

Now, there you get a condition right away where it costs you twice as much to move that ton of State freight a mile as it costs you to move a ton of interstate freight a mile, although they both moved under exactly the same conditions, possibly in the same car and over the same track.

That is the result of apportioning it on the basis of revenue.

Now, if you take it on the three-times basis; that is, three times in proportion to revenue, the State freight earnings being ten cents and the interstate earnings five cents, you would multiply your State earnings by three, which would give you thirty for the State as against five for the interstate. That worked out to a conclusion would result in that ton of State freight costing you 8 4/7 cents for moving it a mile, as compared with a cost of 1 3/7 cents for moving another ton of exactly the same kind of freight, perhaps in the same car, a mile. The expense in the case of the State freight, 8 4/7 cents,

would be exactly six times the expense of the interstate, which figures out 1 3/7 cents.

Now, then, if you go still further and assume it costs six times in proportion to revenue, the State revenue being still ten cents, multiplying that by six gives you sixty. The interstate revenue remains the same, five cents. If you apportion your expenses on that basis, the total expense of moving those two tons one mile each, ten cents, you would have to apportion 12/13 to that ton of State; or, worked out, the ton of State freight would cost 9 3/13 cents for hauling it a mile, as compared with a ton of interstate freight, costing 10/13 cents for hauling it a mile; although it may move in the same car, and is the same class of freight, and moves over the same track.

In that case, where you say the expense is six times in proportion to revenue, you are apportioning to the State expenses twelve-thirteenths of the total cost of moving those two tons one mile.

And that is not an exaggerated case, because I start out with a revenue of ten cents for the ton mile of State freight as compared with a revenue of five cents for a ton mile of interstate freight. That would make the State revenue just twice the interstate revenue. Exhibit 19 shows that taking all the State freight into consideration, and all the interstate freight into consideration, the company received more than twice as much per ton per mile for the State freight as it did for the interstate freight.

Mr. Ladd:

Q. Assuming that the revenue for performing certain services for State freight is twice as much

as the revenue for performing the same service in the case of interstate freight, *what does it mean to say that the cost of handling State freight is seven times as much as the cost of handling interstate freight in proportion to revenue.*

A. *It means that you are assuming that the cost of moving the State freight is fourteen times as much per ton per mile as for moving the interstate freight.*

And the point I would like to illustrate, is, that where the service is the same, *there can be no difference in the cost.* The point of origin of the freight can have no effect on the cost as I see it, although where the service is the same the revenue is not the same, by any means.

Q. Take a carload of salt, and a carload of sugar, both in barrels, ordinarily, which would bear the higher rate for transportation?

A. The sugar would run from double to more than double as much as the salt, for the same distance and the same weight.

Q. Suppose it is twice as much, and there is the same weight in the car, and that it is in barrels, and although both carloads are shipped from St. Louis to Jefferson City, and go into the same train —is that an illustration of the proposition that the revenue received has no relation to the cost of the services?

A. Yes, sir.

Q. The company would get twice as much for hauling that carload of sugar as it would for hauling that carload of salt?

A. Yes, sir.

Q. And the expense is exactly the same in both cases?

A. Yes, sir. I would like to say, before I get away from that—I should like to qualify that by saying that when I say the expenses are exactly the same, I mean that the only possible difference in the cost is the liability which the company assumes for the value of the two shipments, the sugar being more valuable than the salt. But the total loss and damage paid by the company are such a very small per cent of their gross earnings that when you come to consider the cost per ton per mile, it almost vanishes."

On page 1186-7 of record, he said:

"Q. The ideal way, Mr. Ludlam, if it were practicable, or if the railroads kept their accounts that way, with this lawsuit in view, would be to keep track of each car, so as to have the kind of commodity and the vacant or unused space in the car, wouldn't it?

A. Yes, sir.

Q. That would be the ideal way?

A. Yes, sir.

Q. And without that we have all this system of averages and theorizing?

A. Now right there I would like to say that the same ratio of difference, however, must exist in each class of commodities that is shown by the total of all the commodities in each class. That is to say, that if the less than carload State averages twice as much per ton per mile, there must be a preponderance of the articles that are carried in less than carload business, both State and inter-

state, that average higher proportionately in the State business than they average in the interstate business.

Q. In the final analysis, what we get down to, when you figure it your way, it is a system of averages, depending largely upon theoretical calculations, isn't it?

A. *It is reducing the business to a common unit, upon an absolute tabulation of the transactions of the company. It is not theorizing in any sense. It is getting just as far away from that as possible.*

Q. It is calculating upon a system of averages without taking the actual facts into consideration?

A. *It takes all the actual facts into consideration. The amount hauled, the weight, the distance hauled, and so forth.*"

On page 1189 of the record he said:

"Q. You stated repeatedly during your examination that the question of *revenue does not enter into this thing at all?*

A. *Absolutely not at all, into the question of cost; it has not the slightest relation to it.*

Q. The cost should be ascertained in the best way possible?

A. Yes, sir.

Q. The ton mile is not the question; the revenue is not the question; the thing to be desired would be to ascertain the actual cost, if you could ascertain it in any way?

A. *In our judgment, the ton mile basis is the only way in which you could ascertain it.*"

On page 1197, printed record, he said:

"Q. What I want to know is, whether in the light of you experience you would undertake for one moment to say that upon the money invested in the property, more money is made upon the State business, or the short haul business, than there is upon the long haul business?

A. I will answer that by saying that in my judgment, after a very careful study of the situation the Missouri Pacific railroad made more actual net revenue out of the one and a half million dollars of State freight business than they did in the year 1904, and the same amount in the year 1905, than they did out of the four million and odd dollars of interstate business.

Q. That is regardless of how you ascertain it?

A. Yes, sir.

Q. Regardless of 'per ton mile?'

A. It is not regardless of how you ascertain it, because I spent an immense amount of labor to reach that determination."

On pages 1208-10, printed record, he said:

"A. In my judgment you have to consider two elements: The first is the weight of the freight, and the second is the distance which it travels. All railroad rates are made upon the distance that the freight is going. What I mean by that is, if you go to an agent to ship freight, he does not merely ask you what it weighs, without regard to where it is going, whether from here to San Francisco, or from here to Kansas City. The rate is necessarily based upon the distance which the freight is going

as much as it is upon the weight. It takes the two elements into consideration: first, the weight of the freight; and, second, the distance it is going.

For the purpose of illustration, you might compare it with the passenger legislation just passed in this State and now under consideration. The rate is so much per passenger per mile. It does not stop with the passenger. It would be absurd to pass a law that the railroad should charge only so much per passenger twenty-five or fifty cents, because the number of passengers is only one element. The distance they are going is another element to be considered.

The ton mile unit takes into consideration both the element of the weight of the freight and the distance it is going; just as the bill passed by the Legislature takes into consideration the distance the passenger is to travel.

Mr. Hagerman: It just says so much per mile?

A. Yes, sir; exactly what the per ton mile unit does. You cannot conceive of a freight rate being quoted of so much per ton. It is all governed by those two elements."

On page 1199 of record, he said:

Eliminating the ton mile, what do you say about that?

A. I would not express any offhand opinion as to the relative cost or the relative profits of the two classes of business, except as the result of mathematical calculation which I made. *I have seen too many opinions expressed in this case that were in my judgment altogether wrong, to care to express just an offhand opinion.*

The opinion I have expressed is based absolutely on the figures we have made, and the study we have made, and the work we have done, in this case, and it is all predicated on the per ton per mile cost.

Q. And, unless you can predicate it upon the *per ton per mile basis*, you have not any opinion to express?

A. I would not care to express an opinion, except it was worked out on the most reliable and scientific basis that would be obtained.

Q. You have not and did not intend to express any opinion whatever, except it is based upon the per ton per mile basis; am I right about that?

A. Yes, sir; you are right."

Again on pages 3039-40 of the record, he said:

"Q. I will ask you to state, Mr. Ludlam, what, in your opinion, is the correct unit of cost and revenue in the railroad freight business?

A. I think the per ton mile basis is the only correct basis. I might explain that by saying *it is the only one that has been devised or is known to railroad men, that is regarded as reliable.*

Q. I will ask you if that is the one which is *generally adopted by railroad companies*, as far as your knowledge extends?

A. *Yes, sir.*

Q. Do the annual reports of railroad companies, which deal with the details of the management, and review its operations from year to year usually show the ton miles and the cost and revenue per ton mile?

A. The published reports of the different companies usually do. And all companies, whether

they publish these figures or not, so far as my knowledge goes, have them in their records.

The Master:

Q. If I understand you, the correct unit of calculation or estimates for accounting in respect of revenue and expense in conducting railroads, is the ton mile?

Mr. Ladd: Yes, so far as freight is concerned.

Mr. Ladd:

Q. Did you hear Mr. Miller's testimony at the previous hearings in this case?

A. Yes, sir.

Q. You agree with Mr. Miller on that point, do you?

A. Yes, sir.

Q. Is there any other method so correct or convincing, of ascertaining the expenses of the earnings of a company, on different classes of freight, as by using the unit on the ton mile, both for cost and earnings?

A. *In my judgment there is not.*"

EVIDENCE OF A. P. TALIAFERRO.

Mr. Taliaferro testified as follows (pages 899-901, record):

"Q. What is your opinion as to the ton mile being the proper basis upon which to arrive, as well as it can be arrived at, at the earnings and expenses of the freight business?

A. *I think it is the only basis. I have thought so from the very first day I began this work.*

Q. That is to say, the most accurate results will be obtained as to the relative cost of making the earnings, by ascertaining the average earnings

per ton mile, and comparing those with the average cost per ton mile; is that what you mean?

A. As to the earnings, that is strictly correct; as to the expense, I think, that the cost of doing one thing should be compared with the cost of doing another thing; and not with reference to the earnings in any way. Because, for instance, I have here (indicating paper) a carload of dressed poultry from Kansas City to St. Louis; at the present rates a car weighing 20,000 would earn $66.00. A carload of dry hides in bales would earn $40. I cannot see how the cost of handling those two cars would differ. So that 'In proportion to earnings' it seems to me is an unknown quantity always.

Q. I mean taking the whole body of the freight business.

A. Taking the whole body of the freight business, of course, the expenses can be worked out. You have the tons, and the tons one mile, and the expenses; and from those figures you get the average expenses per ton per mile.

The Master:

Q. Doesn't the example you give tend rather to prove that the revenue would be a more correct basis than the ton mile basis?

A. I don't think so. Exactly the same weight is handled the same distance, and in one case the revenue is $40.00, and in the other case it is $66.00. If the car costs just the same to handle in both cases, then the cost in proportion to earnings is radically different. And these are not extreme cases.

Mr. Ladd:

Q. If you get the average cost per ton mile of all the freight, and the revenue per ton mile of all

the freight, should that be the purpose and intention of any investigation, to ascertain the profits?

A. Absolutely, I think so. It should be the starting point for every comparison.

Q. Why?

A. Because it is a unit which could be used for comparison with the same unit arrived at on any other business. It is the unit and the only one I know of, what is the same in all cases.

Q. What have you to say as to apportioning the expenses of the freight business between State earnings and other earnings in proportion to the revenue derived from the respective classes of business?

A. I don't think that is a proper basis.

Q. Why not?

A. Because the State earnings are made up, generally speaking, of charges based on the full local rates. Whereas, the interstate earnings are made up of just whatever proportions of the through rates may happen to accrue to Missouri on a mileage basis. It absolutely ignores the revenue per ton per mile basis. It ignores the fact, as I believe, that the earnings on State business are greatly in excess per ton per mile of the earnings on interstate business; I am making that only as a general statement, but it has to be so.

Q. The earnings derived, therefore, as I understand you, from a higher schedule of rates; is that what you mean?

A. Yes, sir; and from something like a fixed schedule of rates as compared with interstate earnings which are not fixed in any way. They may vary with every shipment.

The Master:

Q. Do you maintain that a division upon the revenue basis would wholly ignore the fact that they get higher rates from purely State business?

A. Yes, sir; I do."

On page 3259 he said:

"Mr. Ladd: The exhibits which have been offered on the part of the State here proceeds upon the theory that the closet approach to an accurate result, whether as to cost or as to revenue in the State business, is the theory known as the 'ton mile theory,' the cost per ton mile and the revenue per ton mile?

Now, I will ask you what is your opinion of that theory as distinguished from any other theory that you have heard of. That is, whether by the adoption and application of it results can be more accurately reached than in any other way, and why?

A. *My idea is that it is the most correct basis, and the one that furnishes the best unit for a division of expenses; it is a ton of freight one mile.*"

On pages 3265-7 of record, he said:

"Q. Are you willing to give any kind of an estimate on this broad proposition? Leave to the court the question of determining upon what basis you must ascertain it, and tell me, whatever the cost is of doing the interstate business, how much more it costs to do the State business?

A. *I do not know of but one way by which to make the figures.*

Q. *What is that?*

A. *On the ton mile basis.*

Q. Then you would not listen to any suggestion, or undertake to give any opinion, based upon anything except the ton mile basis?

A. No, sir. I would like to say this, Mr. Hagerman, if I may.

My first impressions of the ton mile were gotten many years ago, when I sat opposite the Chief Traffic Officer of a railroad company, and saw him figure on that basis.

When I got into these cases, and saw them figuring on the *revenue basis,* I thought immediately it was *wrong,* because I know the State business must have been done at a much *higher rate per ton* per mile than the interstate business. I have had that in mind from the beginning, and the more I have thought about it, and the more I have listened to the testimony, and found that the railroads out here were run just as I supposed they were, the more I have become convinced that the *ton mile is the best basis.*

Q. I am assuming you would not swear to it, unles you were convinced that it is so.

A. I am only telling you why I think it is so.

Q. That being so, I am simply asking you whether you would be willing to venture an opinion, that whatever that cost is, and however it is ascertained, how much extra would it be to do the State business?

A. Only on one basis.

Q. You would listen to nothing else, or consider nothing else.

A. *Nothing else would mean anything to me.*

* * * * * *

Q. Will you give me the benefit of an answer to my question, whether the waste space is in favor

of State or interstate, there could not be any comparison upon a ton mile basis, by which you would take into consideration the waste tonnage, because it is an impossibility to make the comparison?

A. The ton mile basis takes into consideration the tonnage and the haul.

Q. Does it take into consideration the waste tonnage?

A. *It does just as much in one case as it does in the other; that is all I can say about it.*

Q. That is all you can say about it?

A. *Yes, sir; just as much in the case of state as in the case of interstate.*"

On pages 4519-22 of record, he said:

"Q. Mr. Taliaferro, I wish you would state what, in your opinion, derived from your experience of all kinds, which you detailed this morning, and your information which you obtained in various ways, including the information you gained from hearing the testimony in these cases, and examining records, and your investigations, what is the proper unit of cost for freight service?

A. I think the ton mile. *It is the best available unit.* It may not be exactly accurate, but it comes nearer representing the weight of the freight, and the distance it is hauled than any other unit.

Q. Likewise, what is the proper unit of earnings in the freight service?

A. The ton mile, I think. It has always been considered an important figure ever since I ever knew anything about railroads, 22 years ago.

Q. Have you or not been corroborated in your

opinion by the testimony of witnesses which you have heard in these cases?

A. I would regard it in that light. I do not know just what the witnesses may have meant.

Q. What witnesses?

A. Going back to the hearings before the Master, I think Mr. Gray of the Northern Pacific bases all his calculations on the ton mile. Mr. Rawn, the General Manager of the Illinois Central, made his figures on the ton miles basis. Mr. Clark of the Missouri Pacific, and Mr. Miller of the Wabash—

Q. Who is Mr. Miller, the General Manager of the Wabash?

A. The Vice-President, I think.

Q. The General Manager?

A. Vice-President and General Manager, I believe.

Q. *Do you happen to know whether any railroad companies keep statistics in their office as to the cost per ton mile of handling freight?*

A. *Yes, sir; I think quite a number of them do. The roads in whose office we have gone in this work do.*

Q. *What offices?*

A. The Wabash, the Missouri Pacific and the *Burlington railroads.* I speak of those from a little more intimate knowledge than I have of the others.

Q. What, in your judgment, is the basis upon which the expenses of doing state and interstate business ought to be divided between those two classes of business?

A. I know of nothing more correct than the ton mile. We have considered every basis that has been suggested, and our conclusion is that that is the most correct basis.

Q. What is your objection, or what objection can you state, if there is any objection which is a good one, to dividing these expenses on the basis of the revenue derived from both classes of business?

A. *I don't think the revenue has anything to do with the cost, Mr. Ladd.*

* * * * * * *

Q. So far as your experience with railroads and railroad accounting goes, have the railroads undertaken in their systems of accounting to ascertain the cost per ton mile?

A. *Yes, sir; so far as I know all the roads do it. At least I believe I could say that is generally done without fear of contradiction.*"

C.

THE RAILROADS' OFFICERS AND EMPLOYES WHO TESTIFIED IN THIS CASE WERE FORCED TO ADMIT THE CORRECTNESS OF THE *TON MILE THEORY*.

The experts for the State are not alone in the opinion that the cost per ton mile is the measure, and that cost cannot be ascertained by a contemplation of revenue. They are supported in their view by the opinions of some of the most conspicuous witnesses for the complainant expressed in unmistakable, and sometimes emphatic, terms.

Mr. Elliott says that the ton mile "is a very good unit to compare with." (Record, Vol. I, p. 476.)

Mr. Willard, the vice-president of the complainant, speaks always of the relative expense "per ton mile." (Record, Vol. I, pp. 512, 517, 519, 524, 527.)

Mr. Rawn, general manager of the Illinois Central Railroad Company, says: "We do compute our cost upon what is called a ton mile basis." (Record, Vol. I, p. 578.)

Mr. Gray of the Northern Pacific Railroad Company, in all his experiments and computations, seeks to arrive at the *cost per ton mile*. (Record, Vol. I, pp. 622, 623, 624, 628, 644-5, 652, 663, 680.) And being asked whether he thought it the best and proper basis upon which to reach the ultimate expense, he said: *"I think it is the only basis"* (p. 645). He also said that in ascertaining the actual cost of doing the work *"the question of revenue cuts no figure whatever"* (p. 680).

Mr. Stuart, general manager of the Erie railroad, says that he *"adopts the system of per ton per mile in ascertaining earnings and cost of operating" on his road.* (Record, Vol. I, p. 698.)

Mr. Clark, division superintendent of the Missouri Pacific railroad, said that he was a *"ton mile man,"* and all his estimates of expense were upon the basis of the ton mile, and that he accepted it *"because it is used so generally."* (Record, Vol. II, p. 1646.)

Mr. Fisher, supervisor of weighing and inspection for the Missouri Pacific Railroad Company, after testifying that in his opinion it cost from two to six times as much to earn a dollar in State freight business as to earn a dollar in the interstate business (Record, Vol. IV, p. 1753), said that while he knew that railroad companies used the ton mile basis of cost for statistical purposes, it should not be "used *in a performance of this kind"* (p. 1754).

Mr. Tyler, general superintendent of 2,000 miles of the lines of the St. Louis & San Francisco Railroad Company, said that his company kept an *accurate account of the cost per ton mile of moving freight.* (Record, Vol. IV, pp. 4104, 4129, 4131-2.)

Mr. Doddridge, former general manager of the Missouri Pacific railroad, while condemning it in his opinion as a witness, says that the *ton miles as a basis of calculation for ascertaining cost, is used by the Interstate Commerce Commission and by railroad companies "for statistical purposes."* (Record, Vol. II, p. 1585.)

Mr. Miller, general manager of the Wabash railroad since May, 1905, and who for twenty-five years immediately preceding, had been connected with the railroad of the complainant in Missouri as general superintendent, division superintendent, assistant superintendent, and in other capacities, testified as a witness for his company, and said: *"Our unit is ton miles."* (Record, Vol. II, p. 2836.) He said that the annual reports of his company for each of two years then shown to him, exhibited the cost per ton mile of transporting freight on the Wabash system; that the preparation of such

a statement involved great labor and was for the purpose of showing the ton mile revenue and the ton mile cost; that the ton mile is the unit, and that it *"is the unit that is generally used"* (pp. 2839-40).

He testified (p. 2840 of record):

"Q. In order to reach that result, let me see if I understand how it is attained: You take each shipment, interstate or intrastate, and suppose it is a ton, you multiply that ton by the number of miles you carry that shipment; and you deal with all the shipments that way, and the aggregate of those ton miles produces your total ton miles. Is that right?

A. I think that is the way they get at it.

Q. Was not my question quite clear?

A. Oh, yes.

Q. That is the way it is done?

A. Yes, sir.

Q. Then you divide your total revenue from freight by the total number of ton miles, and you get revenue per ton mile, don't you?

A. Yes, sir.

Q. And you divide your total freight expense by your total ton miles, and you get the cost per ton mile, don't you?

A. Yes, sir.

Q. *And you regard the ton mile as the unit, and the cost per ton mile and the revenue per ton mile, as indicating more exactly than by any other method that can be pursued, the condition, prosperous or otherwise, of the freight business of the system; isn't that right?*

A. *Yes, sir.*"

Q. *And is that a custom which prevails among the railroads generally?*

A. *Yes, sir.*

Q. *Then the cost per ton mile is the unit of expenses in the freight business?*

A. *Yes, sir.*

All his estimates of relative expense were of expense per ton-mile (pp. 2851, 2860, 2872, 2900).

> "We do not use the train mile unit in our comparisons, because it does not represent the modern unit, either in comparing or in our statistics." (p. 2903.)

On pages 2904-5, he said:

> "Q. What is a ton mile?
>
> A. It is the movement of a ton of freight one mile.
>
> Q. And how do you get at the cost per ton mile?
>
> A. By computing the mileage over which the tonnage is handled and finally dividing the total tonnage carried one mile into the total expenses. The cost of conducting transportation, and those things that appear in that sheet, under the head of 'Operating expenses,' were reached by dividing the tonnage of the trains into the cost, and there is the result.
>
> Q. As I understand you, at one time the method employed was the cost per ton per train mile. Is that true?
>
> A. Yes, sir.

Q. Did I understand you to say that that method has now been abandoned?

A. Most of the roads have up-to-date operating statistics, such as those are (indicating), but pay no attention whatever to the train mile. That was the unit formerly used on the Wabash, and we abandoned it because it did not reflect the actual operations of the railroad and the cost. And it did not show by accounting divisions each train run: an accounting division is practically a train run; so that these results show the cost of operating each train by itself, even on the branches. The plan is to find out where the leaks are, locate them, and plug them.

Q. Is it generally conceded by railroad people that the train mile cost does not correctly indicate the cost of handling freight business?

A. Yes, sir.

Q. And that method has been abandoned by railroad people?

A. As a unit.

Q. As a unit?

A. Not entirely. We include it because that form of statistics shows it, but do not use it in any way."

Mr. Minnis (p. 2906):

"Q. Mr. Miller, if I understand you, in arriving at the cost of freight per train mile you add together the entire number of miles that are covered by freight trains during a given period and you divide that aggregate into the aggregate cost for the same period, and that gives you the cost per mile. Is that correct?

A. That is the way the train mile is reached.

Q. In order to get the average tonnage of trains, you take the total tonnage of all trains and divide that by the number of trains that carried that tonnage, don't you?

A. Yes, sir.

Q. According to this method the train mile cost will be less where the average train tonnage is less, than it would be where the average train tonnage was greater, wouldn't it?

A. Yes, sir.

Q. That is necessarily so because it does cost some more to carry a heavy load than a light load, doesn't it?

A. Yes, sir.

The Master:

Q. The system then would be in the direction of putting a premium on light trains?

A. Yes, sir; that is the reason it was discontinued as a unit of determining the cost of transporting and handling freight. The best showing could be made by running the trains light, on a train mile basis. But that is not true on the ton mile basis. *You get down to "brass tacks" on ton mile.*

Q. *You get down to the actual conditions on the ton mile.*

A. *Yes, sir.*

Shortly after the decree was rendered in the court below, the late Mr. E. H. Harriman expressed his views upon various subjects in an interview which was published simultaneously in all the leading papers in the country. Among other things, he said:

"How would you effect a reduction in the expenses of the government?" was asked.

"By applying the *cost per ton per mile rule*, so to speak, by which the railroads *effect their economies*. I mean by that, that the railroad managements *know what it costs them to transport a ton of freight one mile* and are governed accordingly, and, furthermore, *they are constantly striving to reduce that unit of cost*. If this principle were to be applied to the financial problems of the government you would see a marvelous change in a few years. In the management of the government there should be more thought of what is right and less thought and less care about political success."

The Chicago Record-Herald of April 1, 1909.

The railroad companies have then, in this litigation, abandoned their own "unit of cost;" they have deserted their own established system of cost accounting; they present here and in this case a new "unit of cost" unknown to the railroad systems. In the place of using their own "unit of cost," they now offer another method, another unit, which, in the practical and actual management of their business they ignore, to wit, the "gross revenue basis." The trial court passed by the "unit of cost" used by the railroads in actual business operation and accepted as gospel truth the substituted basis of cost accounting, a basis which has condemnation stamped upon its face, not only by the State's experts, but by the roads themselves, and by that reason which appeals to the consciences of men and tells them when they are traveling upon the highway of justice.

D.

THE COURTS CONDEMN THE "GROSS REVENUE" THEORY AND PROCEED UPON THE BASIS OF THE "TON MILE" THEORY.

There can be no questiton in theminds of this or any other court as to the accuracy of the statements of the late Mr. Justice Brewer in the case of Ames v. Union Pacific Railroad Company, 64 Fed. 182, in addressing himself to this same subject and wherein he held that there was no relation between expenses and revenue and that under changed conditions as to rates:

> "Obviously the cost of transportation would be the same, whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by House Roll 33."

This ought to clearly demonstrate to the Court the manner in which the application of the revenue theory will, under differential rates or in any event where the rates are not on an absolute equality work a hardship on one or the other in accordance with the general disparity between rates, when the expenses are apportioned on the ratio that the gross revenue of the one bears to that of the other. The factors are not equal. A division of expense with unequal factors is bound to be wrong. All the State's witnesses and part of the railroad men sustain Justice Brewer. They said that revenue had nothing to do with it. That revenue had no possible relation to cost.

The late Mr. Justice Brewer, in Chicago, Milwaukee & St. Paul Railroad Company v. Tompkins, 176 U. S. 176, re-

versed the case because of the application of the revenue theory in finding values, and shows by an example how absurd the theory becomes when thus applied, saying:

> "Such a result indicates that there is something wrong in the process by which the conclusion is reached. That there was, can be made apparent by further computations, and in them we will take even numbers as more easy of comprehension. Suppose the total value of the property in South Dakota was $10,000,000, and the total receipts both from interstate and local business were $1,000,000, one-half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be $5,000,000, and the per cent of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one-fifth of what they had been, so that instead of receiving $500,000 the company only received $100,000. The total receipts for interstate and local business being then $600,000, the valuation of $10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers $8,333,000, and to that engaged in earning local receipts $1,667,000. But if $1,667,000 worth of property earns $100,000 it earns six per cent. In other words, although the actual receipts from local business are only one-fifth of what they were, the earning capacity is three-fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as $8,333,000, and it earned $500,000, its earning capacity was the same as that

> employed in local business—six per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced."

If the revenue theory cannot apply in finding values, it cannot apply in finding expenses, the other important factor in the problem.

In the case of Atlantic Coast Line Company v. Ellis, 203 U. S. 256, at page 260, the late Mr. Justice Brewer, speaking of the difficulty, used this significant language:

> "We are aware of the difficulty which attends the proof of the cost of transporting a single article and in order to determine the reasonableness of a rate prescribed it may sometimes be necessary to adopt as a basis the average rate of all transportation *per ton per mile.*"

The complainant cites the case of Smyth v. Ames, 169 U. S. 466, as an authority for the revenue theory. It is not an authority upon that proposition. The revenue theory was not presented to them. The Court had no opportunity to make a choice as to theories or bases upon which to make a division of expenses between State and interstate traffic. A reading, however, of the opinion discloses that the property was divided upon the mileage basis and the expenses upon the basis of the per ton per mile. At page 529, Mr. Justice Harland, in speaking of the alleged extra cost of carrying local freight, says expressly that the extra cost of local as against through freight is so much per ton per mile. The tables on pages 530, 531, 532, 536 and 538 are all figured

upon the basis of carrying one ton of freight one mile and one passenger one mile; that is, the freight per ton per mile and the passenger per mile. This Honorable Court has never passed away from this per ton per mile and passenger per mile method.

Judge Trieber, in St. Louis Southwestern Ry. Co. v. Allen, 187 Fed. 291, finds that the gross earnings method must be wrong. He says (p. 321):

> "The straight revenue theory, as advanced by the learned counsel and accountants of the railroads is clearly wrong as none of them take into consideration the increased rates charged for the intrastate traffic. No further proof of the fallacy of this theory is required than the examples and calculations of the accountants for the railroads in the exhibits filed with their testimony. Mr. Nay, who, at the time he testified, had thirty-seven years' experience as a railroad accountant, having begun as a clerk of statistics, and was at the time his testimony in these cases was taken, the comptroller of the Chicago, Rock Island & Pacific Railway Co., one of the great railroad systems of the country, gave the following illustration for the purpose of establishing the correctness of his theory and to controvert, as he states, 'an argument which is sometimes used to the effect that using the revenue basis is like traveling in a circle. and those who take that position claim that when the revenue of intrastate traffic is doubled the operating expenses are also doubled and the end is just the same as in the beginning.' He thereupon gives the following illustration to demonstrate the fallacy of that argument, as he states:

" 'First take the illustration a small railroad with freight operating revenue of $100,000 and freight operating expenses of $80,000, of which the intrastate freight traffic is $25,000 and the interstate freight traffic is $75,000. We have the following statement:

	Intrastate.	Interstate.	Total.
Operating freight revenue . . .	$25,000.00	$75,000.00	$100,000.00
Operating freight expenses, divide the expense between the intrastate and interstate on a revenue basis and it would be as follows	20,000.00	60,000.00	80,000.00
Net operating freight revenue	$5,000.00	$15,000.00	$20,000.00

" 'Suppose that the rates on intrastate freight traffic are increased so as to exactly double the intratstate freight revenue, leaving the interstate freight revenue just the same, and the operating freight expenses exactly the same, an impossible condition in actual practice, but the extreme condition is used in order to emphasize the error of the argument that doubling the intrastate revenue in such a case would double the intrastate expenses. After doubling the intrastate freight revenue just mentioned we would have the following statement:

	Intrastate.	Interstate.	Total.
Operating freight revenue	$50,000.00	$75,000.00	$125,000.00
Operating freight expenses to intrastate revenue nearly 40 per cent of the total revenue, the operating expenses of $80,000.00 divided on the revenue basis would now be.	32,000.00	48,000.00	80,000.00
Net operating revenue	$18,000.00	$27,000.00	$45,000.00

" 'From this it will be seen that, although the intrastate freight earnings were increased $25,000.00 after the intrastate tariff rates had been raised 100 per cent without any increase in expenditures, in the final result it is the beneficiary to the extent of $13,000 only, while the interstate earnings, with no increase in these rates, increased $12,000.' "

It may be properly mentioned at this point that the Circuit Court of the United States in the District of Nevada, in Southern Pacific Co. v. Bartine, 170 Fed. 725, rejected the view that expenses can be ascertained by a comparison of earnings as have many other trial courts.

The matters contained in this division of our brief alone should be sufficient to condemn as error the adoption

of the "gross revenue basis" by the Court for the division of expenses between State and interstate traffic, both as to freight and passenger business.

The learned trial judge adopted the "gross revenue" basis because of its *simplicity;* but is *simplicity* to displace *accuracy* and *justice?* He used a basis which would require the State and interstate rate to be the same per ton and which would require the expense per ton on each class of traffic to be the same. But the rates and revenue are twice as much per ton for State as interstate and expenses are not the same per ton on their own showing. So with both these factors being unequal the court's error is plainly manifest.

E.

IT COSTS MORE TO HANDLE INTERSTATE FREIGHT LESS THAN CARLOAD LOTS THAN IT DOES STATE FREIGHT LESS THAN CARLOAD LOTS.

Interstate business in less than carload lots (and this is the expensive part of the business) received by the complainant in each case at its important eastern and western terminals in Missouri from a connecting road is, at the point of connection, unloaded from the car of the connecting road, loaded into complainant's warehouse, and then reloaded into one of complainant's cars in a train, for its point of destination within the State. As to such business the terminal charges for interstate business are larger than for State business, because at the point of connection there is one additional unloading.

In the case of less than carload State business there is one loading at the point of origin and one unloading at the point of destination. In the case of interstate less than carload business, under the circumstances just mentioned, there is one unloading at the place of connection, a loading into the car at that place, and another unloading at the point of destination.

The testimony upon this point is very clear (p. record, 872).

C. S. Ludlam, one of the State's experts, testified as follows:

> "Q. Mr. Ludlam, in your judgment, is the cost per ton mile of handling State less than carload business any greater than the cost per ton

mile for handling less than carload interstate business?

A. No, sir.

Q. Why?

A. The cost of handling interstate less than carload business, in my judgment, would be more than handling the State less than carload business for two reasons principally:

The first one is that the majority of interstate less than carload business is unloaded at the station and then reloaded and then unloaded at destination. That means that interstate less than carload business is loaded once and unloaded twice. Whereas, State less than carload business is loaded once and unloaded once."

Mr. Taliaferro, one of the State experts, testified as follows (pp. 898-9 and 3022, Record):

"Q. Based upon your same knowledge and information, I will ask you whether, in your opinion, it costs any more to handle State less than carload freight than interstate less than carload freight, per ton mile?

A. I think it costs less to handle interstate less than carload freight.

Q. It costs less to handle interstate less than carload freight?

A. Yes.

Q. Than it does to handle the State less than carload freight?

A. Yes, sir.

Q. Why? What is the difference?

A. The idea I have in my mind is, that it is not practicable to load less than carload freight for

a long haul. It has to be handled and rehandled many times in going a long distance. Freight coming from Chicago, we will say, by the Burlington, to a point in Missouri, might be, and I think from the information I have gotten about these matters generally since I have been looking into them, would be rehandled at Hannibal; or any other road would have to receive the shipment from the connecting line at the Mississippi river, unload it, and reload it in some car going out over their line. Whereas, a shipment starting from Hannibal or St. Louis would be delivered into the freight house at the proper door, just where it would be put right into the car that the company would use for forwarding it.

Q. Would the cost in that respect of handling interstate less than carload freight be greater or less than the handling of strictly State less than carloads?

A. I think it is more.

Q. You said awhile ago you thought it was less.

A. If I recall, I think I said the cost of handling less than carload interstate business in the State of Missouri was, to my mind, more than the cost of handling State less than carload freight.

Q. I think you turned it around in answer to my first question.

A. I didn't intend to.

The Master:

Q. Your judgmment is, it costs more to handle interstate less than carload freight?

A. Yes, sir."

And the testimony of Mr. Bethard, superintendent of transportation of the Missouri, Kansas & Texas Railroad Company, is to the same effect. (Record, Vol. II, pp. 1830-1.)

Mr. Miller, general manager of the Wabash Company, describes the same course of business.

Thus we see these able and efficient experts who testified upon behalf of the State and who possessed large experience in the operation of railroads and in the matter of railroad cost accounting and in the auditing of many of the largest railroad companies' books in the United States and who were fair, unprejudiced and unbiased by financial or personal interests, and who were pre-eminently qualified to do so from actual experience and from actual facts ascertained from careful and candid investigations, have denounced the "gross revenue theory" testified to by the employes of the railroad companies and which revenue system was adopted by Judge McPherson in this case for the division of expenses between State and interstate freight.

These same experts, without exception, and in candor, declare that the cost *per ton per mile* is the only basis upon which to ascertain the costs for the two classes of traffic. They defend that position and denounce the gross revenue theory by sound reason, examples and facts that are convincing and unanswerable.

We find that when the railroads' employes said that it cost on the revenue basis seven times as much to haul State freight as it did interstate freight, that it was tantamount to saying that it cost *fourteen times* as much to move a ton of State freight one mile as it did a ton of interstate freight one mile. This is so absurd and so shocking to one's intelligence that to make the statement is to denounce it.

It might be well here to say that Mr. Taliaferro testified (Record, Vol. IV, pp. 45, 54) that it cost about 29.07 per cent more to handle State freight than it did interstate

freight on the *"ton mile basis."* And Mr. Ludlam said 25 per cent (pp. 924, 932, 3045-6). The court must remember that this is very different from saying it cost 50 *per cent more on the "gross revenue basis,"* because on the *gross revenue basis* that would be *three times* as much to move a ton of State freight as a ton of interstate freight.

F.

THE QUESTIONS OF TERMINAL CHARGES, WASTE SPACE, INSIGNIFICANCE OF LESS THAN CARLOAD BUSINESS, LENGTH OF HAUL, MAINTENANCE OF SIDETRACKS, ETC.

The railroads gave many other so-called reasons for their absurd contention that the handling of local freight costs from three to eight times as much as through freight, among them being terminal charges, waste space, length of haul, maintenance of sidetracks, etc. Each one of these assigned reasons has been specifically and fully answered in our main brief filed in the Burlington cases, and we deem it needless to notice the same here, but adopt our reasons set forth in said Burlington brief as our reasons here. They are under the following subdivisions and pages in the Burlington brief, to wit:

1. Terminal charges. (Subdivision "F," Burlington brief, page 163.)
2. Waste space. (Subdivision "G," Burlington brief, page 171.)
3. Maintenance of tracks and other facilities at places between division points. (Subdivision "H," Burlington brief, page 173.)
4. Insignificance of less than carload business. (Subdivision "I," Burlington brief, page 178.)
5. Operating expenses in Missouri of roads. (Subdivision "M," Burlington brief, page 251.)
6. Railroads did not show if they had charged the rates fixed by the acts and the other rates fixed by the commissioners they would not

have realized a reasonable return from their properties. (Subdivision III, Burlington brief, page 278.)

7. Action prematurely brought. (Subdivision IV, Burlington brief, page 281.)

The full discussion of the above matters in our main brief in the Burlington case so completely answers the contention of the roads, and there is so little merit in their contentions that we will not stop to answer same again here, but content ourselves with the reference to the paragraphs, pages and subdivisions above noted in our Burlington brief.

II.

THE ACTION OF THE COURT BELOW IN DIVIDING THE COURT COSTS IN EACH CASE WILL NOT BE REVIEWED HERE.

In equity, costs are not imposed, as, of course, upon the unsuccessful party. The disposition of the matter of costs is discretionary with the court. And the circuit court, in its supplemental opinion (Record, Vol. V, pp. 5327-8), mentions some of the reasons which induced its action.

This court has said:

> "In actions at law, it is a general rule that the losing parties, or the parties against whom judgment is rendered are to pay the costs; and no apportionment of the costs is made between them. Each is liable for all, whatever may be their respective interests in the subject-matter of the suit. In equity it is different. There the court has a discretion as to the costs, and may impose them all upon one party, or may divide them in such manner as it sees fit."

Kittredge v. Race et al., 92 U. S. 116, 121.

DuBois v. Kirk, 158 U. S. 58, 67.

Nebraska v. Iowa, 143 U. S. 359, 370.

Consolidated Mining Co. v. Baker, 131 Fed. 989.

Western Coal & Mining Co. v. Petty, 132 Fed. 603.

Ambler v. Auditor-General, 38 Mich. 746.

"Costs in chancery do not depend upon any statute, nor do they absolutely depend upon the event of a cause. They depend upon conscience, and upon a full and satisfactory view and determination of the whole merits of a case. They rest in sound discretion, to be exercised under a consideration of all the circumstances."

Chancellor Kent in Eastburn v. Kirk, 2 Johns. Ch. 317, 318.

III.

THIS COURT WILL NOT CONSIDER THE QUESTIONS RAISED BY THE COMPLAINANT'S ASSIGNMENT OF ERRORS ON ITS CROSS-APPEAL.

The complainant in the court below obtained all the relief which it sought. The officers of the State were permanently enjoined and the laws attacked were declared unconstitutional and void. If the questions raised by the complainant's assignment of errors had been decided by the court below in its favor, the decree could have been no more sweeping; the complainant could have obtained no greater or further relief than was granted to it. The questions raised by its assignment are, therefore, simply moot questions. If this court were to take complainant's view in respect of them, it could do no more than affirm the judgment of the circuit court.

Rogers v. Penobscot Mining Co., 154 Fed. 606.

IV.

SUPPLEMENTAL BILL.

That the matters contained in the supplemental bill filed in each case were not germane to nor supplementary of the original bill so filed in each case, and that the State court had acquired jurisdiction in said cases prior to the filing of said supplemental bills, and that the railroads in each case had an adequate remedy by defense in the State court to the suits so instituted by the State, have been fully discussed in part II of our main brief in the Burlington cases and cover pages 288 to 315, inclusive, to which we make reference and adopt same as our discussion and brief upon those questions here.

The act upon which each original bill of complaint was based was repealed by the Legislature in 1907. New laws were enacted, which could have been the subject for the filing of new and original bills of complaint, but were not the subject of supplemental bills. The matters were not germane to the original bills. The passenger rate law was a new enactment. There had been no original bill in reference to passenger rates. After the repeal of the only legislative enactment upon which the original bills were based and prior to the filing of the supplemental bills, the State had filed petitions in the circuit court of Jackson county, Missouri, and secured service upon each of the railroads, wherein the State, through its proper officers, sought to enjoin the roads from violating the provisions of said new legislation.

The State court, therefore, had acquired jurisdiction and the Federal court was without jurisdiction in the matters in controversy. It made quite a difference. In the State court

the officers of the State in their official capacities were parties litigant, whereas in the Federal court the said parties were held to be parties litigant in their private and not in their official capacities.

For the full discussion of this subject we refer to our brief in the Burlington case, as above stated.

V.

PASSENGER—DIVISION OF EXPENSE BETWEEN STATE AND INTERSTATE.

THE SO-CALLED REVENUE BASIS OF APPORTIONING EXPENSES BETWEEN STATE AND INTERSTATE BUSINESS WAS ADOPTED BY THE COURT, THAT IS, THE RATE PER PASSENGER MILE FOR STATE TRAVEL BEING HIGHER THAN FOR INTERSTATE TRAVEL, IT WAS ASSUMED THAT THE COST OF CONDUCTING THE BUSINESS WAS HIGHER, AT LEAST IN LIKE PROPORTION. THIS WAS WRONG, AND THE EVIDENCE SHOWS THAT THE RATES FOR STATE AND INTERSTATE TRAVEL WERE FIXED WITHOUT REGARD TO THE RELATIVE COST OF EACH KIND OF BUSINESS.

A.

The general discussion of the passenger side of the cases is fully presented in our main brief, from pages 318 to 394, inclusive, in the Burlington cases, and to which we can add but little. We adopt same here.

The fundamental and vital principles presented and discussed in the preceding parts of this brief as to the Court's many errors on the freight side of the cases and as to why the expenses as to State and interstate freight cannot be divided upon the gross revenue basis, will apply with equal force here. If the finding and decree of the Court fails as to the freight side it would necessarily fail as to the passenger side.

The average rate received for State travel is higher than the average rate received for interstate travel. Prior to the enactment of the two-cent maximum, it was about 2.44 cents per mile in State business and about 2.10 cents in interstate. After the enactment of the two-cent maximum, the rates, respectively, were about 1.96 cents and about 1.83. In accounting the companies apportion expenses among the different kinds of business according to the revenue derived from each. The court adopts this as a basis upon which *costs of service* are to be determined.

This, we submit, is manifestly erroneous, unless the cost of doing business was first ascertained and the charge for doing it determined by that cost. Unless this was done, the revenue basis leads to the absurdity *that the cost of service is increased by the mere fact of an increase in the charge or rate therefor, and is decreased by a decrease of the charge or rate therefor.*

There has been no attempt here to show that *rates were fixed originally with reference to relative cost,* and on the contrary, the evidence is all to the effect that a uniform mileage rate was imposed for all travel, State and interstate, and that the lower existing rate for interstate travel is due entirely to competitive conditions.

Mr. William Ellis, commerce counsel of the Chicago, Milwaukee & St. Paul Railway Company, testifies that his company does not and never did adjust charges to the expense per passenger mile of running its various trains, and that a uniform mileage rate had always been exacted except as competitive conditions reduced the rate on the longer journeys. (4-4236 and 7.)

Mr. P. S. Eustis, the passenger traffic manager of the Burlington company, testifies that the usage of his company, and, indeed, of all companies, was the same from the very beginning, and for the reason he says that wherever it has

been regulated, the charge has been fixed upon the mileage basis by statute, "and where the individual had freedom to do as he pleased it were folly to adopt any other basis." (4-4371-4374.)

If the rates for State and interstate passenger travel were the same, then the *equality* of rates (if the quality of service rendered was the same) on the *revenue basis* would give *equality* of cost. But we find interstate rates are lower and have been lowered from time to time by competitive conditions, cost not being taken into account, and the service is better and more expensive to the company. Now, if the *revenue basis of determining cost* be adhered to, we are driven to the conclusion that the *cost* of interstate service has been correspondingly *reduced. That the sharper the competition, the greater the reduction and the greater the reduction the lower the cost. This, too, although we find this same competition has brought about faster trains, parlor, Pullman, buffet and observation cars, finely, expensively and magnificently equipped, carrying with it a superior and more expensive service than is rendered in its absence. As to how such reasoning and philosophy or logic could commend itself is more than we can understand.*

A reduction of rates required by law has no such effect. "Obviously," says the late Mr. Justice Brewer, in Ames v. Union Pacific Ry. Co., 64 Fed. 165, l. c. 182:

> "The cost of transportation would be the same whether the companies received the prices which they did, in fact, receive, or the reduced rates prescribed by house roll 33."

Commenting on this in the case of Southern Pacific Co. v. Bartine, 170 Fed. l. c. 757, Judge Farrington said:

> "This statement seems too clear to require demonstration or thesupport of authority; and it is

equally clear that the cost of transportation would be the same whether the rates and the resulting gross income be increased or decreased. The mere fact that a man receives $20 rather than $10 for performing a service cannot increase his expenses."

The cost is incurred regardless of the return received for the service, and must, therefore be independently ascertained. The expense cannot be inferred from the income, especially so, in the railroad business, where all the experts concur in saying that rates are not based on costs.

This court condemns the gross revenue theory in finding values in the case of St. Paul Railroad Co. v. Tompkins, 176 U. S. 176, from which we have heretofore quoted. If it cannot apply to values it cannot apply to expenses.

THE SERVICE RENDERED IS AN IMPORTANT FACTOR TO BE CONSIDERED IN DIVIDING THE EXPENSE BETWEEN STATE AND INTERSTATE TRAFFIC.

The service rendered is a very important factor in determining the propriety of the rate and in the division of the expenses. The revenue theory adopted by the trial court disregards the quality of the service and burdened State passenger traffic with expenses incurred for the benefit of interstate business and with the cost of conveniences to interstate travel, and which resulted in inconvenience to State travel, thus charging State travelers for *disservice*, rather than for *service*, and making those pay *most* who get *least*.

If the expenses between State and interstate passenger traffic should be divided on the passenger mile basis, then there must be added to the expense of handling the interstate passenger traffic the additional per cent which represents the outlay, cost and expense of the *kind and quality of*

service rendered interstate passengers by the fast trains, parlor, buffet and observation cars and other superior and expensive service and conveniences given it.

The revenue theory adopted by the court followed to its legitimate end, is, the lower the interstate rate, the faster and finer the train, the more splendid the service, and the cheaper the cost to the company. Under the trial court's logic this is bound to be the result, because the less the revenue from the operation of the train the less the expense assignable for running it. If the trial court's position is correct, then the road can continue to reduce its interstate rate until finally it charges nothing, but operates its train free, and there would be no expense assignable to the interstate traffic therefor. It could run its finest and most gorgeous and splendidly equipped interstate train, and render a service fit for a king, and there would be no expense attendant, because having received no revenue no expense could be assigned. The absurdity of the basis is so apparent it would seem idle to discuss the question.

It is not contended that there should be any discrimination in favor of State travel, but it is insisted that there is no right to discriminate against it. If the companies for their own convenience and profit choose to establish through trains and compel the State passenger to travel on local trains, they may perhaps do so; but if the expense of conducting the local business considered apart is thereby increased because of it, it cannot properly be imposed upon the local business, because the increase was not incurred for the benefit of that business.

The State has the right to require that the interests of its people be considered and fully and fairly served, and that the companies cannot exact rates without reference to the fair value of the property used for the public *or the fair value of the service rendered.*

Minneapolis & St. Louis R. R. Co. v. Minnesota, 186 U. S. 257.

Lake Shore R. Co. v. Ohio, 173 U. S. l. c. 301.

Cleveland, etc., R. Co. v. Illinois, 177 U. S. l. c. 521.

Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262.

Atlantic Coast Line case, 206 U. S. 1.

Smyth v. Ames, 169 U. S. 466.

Covington, etc., Turnpike Co. v. Sanford, 164 U. S. l. c. 596.

The court erred in finding that the *intra*-state passenger traffic cost at least 25 per cent more than the interstate passenger traffic, because the evidence does not support such finding, and in fact is exactly contrary thereto, as has been heretofore in this brief fully explained. The fact is that the *intra*-state passenger traffic is carried on at a smaller ratio of expense than the interstate. Such facts are so evident and so generally well known as to need no further argument or demonstration.

The fact of the matter is, that as to the passenger traffic it is the *local business* which produces the greater profit for the railroads. It requires no special training, deep insight, or extraordinarily keen intelligence to understand what is actually the fact, that for the most part the *intra*-state passengers are carried in the local trains, which trains are composed of *two or three light coaches, carrying say* 100 *passengers, as against the movement of the interstate and through trains* on which, by far the larger percentage of interstate passengers are carried, whose weight will average from *two to six times* that of the local passenger trains and whose carrying capacity is much less than that of the locals in proportion to the number of cars.

Under these conditions can any of these railroad officials attempt to maintain, with any hope of being credited, that a *local train*, carrying principally *intra*-state passengers in *light coaches, heavily loaded, will cost from* 10 *to* 50 *per cent more to operate than an elegantly equipped through train weighing from four to six times as much and carrying probably less than half the number of passengers, most of whom are through or interstate passengers?* It is preposterous to make such claims without showing the reason or basis for the claims. Must they not make proofs? It is generally conceded, and a true exposition of the conditions will prove beyond a question of doubt, that the interstate passenger is carried for a *smaller revenue, and with much larger percentage of expense, than the intrastate passenger.*

B.

HOW EXPENSE ACCOUNTS ARE MADE UP.

It is easy to inflate expenses for any period as a mere matter of accounting or bookkeeping. Here is where the roads disposed of their revenues for suit purposes.

For example, in 1905, the Burlington Company charged operating expenses with five hundred and fifty thousand dollars for the reconstruction of the bridge over the Missouri river at Kansas City. (5-4756.) Manifestly the cost of rebuilding a bridge should be distributed over a period approximately equal to the life of the bridge. But this bridge has not been rebuilt to this day. The old bridge is still in use. *Not one dollar of the five hundred and fifty thousand dollars charged on this account to operating expenses in* 1905 *was expended during that year, or had been expended, when the testimony in this case was closed.* (5-4757.) This item alone is almost equal to the alleged increase of expenses in 1905 over 1904. This large item might as well have been charged to one year as another, or just as well not charged at all. The only thing that could be justified in this connection would be a depreciation charge of a substantially equal amount for each year.

Why was this extraordinary charge made to 1905? Freight rates were reduced by the Legislature of Missouri in that year, and there was an interest, and interest is often an inducement, to charge that year more heavily than preceding ones with expenses.

How much of the amount charged as operating expenses for the fiscal year 1908 is of this sort? We do not know, but there is something very suggestive in the testimony, and we do know that the sum charged for 1908 is in gross and percentage very and exceptionally large.

VI.

THE COURT FOUND THAT "THE EXPENSE OF DOING THE STATE BUSINESS OVER INTERSTATE IS GREATER * * * * * BY AT LEAST TWENTY-FIVE PER CENT FOR CARRYING PASSENGERS." THIS FINDING IS NOT SUPPORTED BY ANY COMPETENT TESTIMONY.

The finding of the Court is without support except in the estimates of the railroads' witnesses, the wide range of which shows them to be largely conjectural.

The only facts adduced are of a *general nature*, and in the main consist of matters of common knowledge. The significance of these facts, their bearing upon the question in controversy is not shown, as it might and should have been, by any records of the railroads' experience.

The facts relied upon are:

The through train carries more cars than the local.

A large portion of the local travel is on branch lines.

The local train makes more stops than the through.

There is more switching of the local train.

There is more terminal service incident to local travel, per passenger mile.

The risk, and consequent expense, of injury to passengers is greater in local business than in through.

More baggage is carried on the local trains.

These are the matters upon which stress is laid by the roads' witnesses in each case. Deddridge (4-3825 to 28), Bullard (4-4078). Whitenton (4-4140 and 41). Ellis (4-4229). McPherson (4-4304 and 5). Eustis (4-4367-71).

THROUGH AND LOCAL TRAINS.

It is to be borne in mind that in these cases we have to deal with travel as State and interstate. The roads do not so deal with it. They deal with it as local and through. A train which crosses the State lines, as those running on the Carrollton and Villica branches, is a local train, while those which run between St. Louis and Kansas City, entirely within the State of Missouri, are through trains.

There is more long distance travel on through trains than on local trains. A larger proportion of interstate than of State travel is long distance. The real contention of the companies is that the long distance travel is handled more cheaply per mile than the short distance travel, and as more of this is found in interstate than the State travel, the former, upon the whole, costs the company less per mile than the latter, or rather that the expense per passenger mile is less on through trains than on local trains.

The testimony shows that there are no trains operated exclusively for State or for interstate passengers by any company in Missouri. Every train on every road carries passengers, State and interstate, between any two points, near or remote at which the train stops.

If then there is any greater expense incident to the operation of local trains, it is by no means all of it chargeable to State travel. How much of the travel on the through trains is State travel and how much of that on local trains is interstate, the railroads have no evidence to show whatever.

And when we consider the various other elements which are said to enhance the cost of local traffic, we have still less of detail and of definite information.

That the through train carries more cars than the local we may accept as true in a great majority of cases. But very much of the State travel is on these very through trains.

How much of it? There is no evidence on the subject whatever.

On the other hand, the cars on the local trains have a greater seating capacity than those on the through trains. The ordinary day coach will seat twice as many passengers as the Pullman or the parlor car. Two cars on the local train may carry as many passengers as four cars on the through train. If they do this, the cost per passenger mile is less on the local train than on the through. What is the fact respecting this? We have no information from the roads at all. The various company experts of whom we inquired also had no information to give. Mr. Press, the statistician of the Frisco, said that his company has nothing to show "the average number of people carried by ordinary or day coaches, as compared with the average number carried by the Pullmans and special coaches of that kind. (4-4644.) Mr. Peabody has not the information as to the Santa Fe. (5-4662.) Mr. Nay is unable to say as to the Rock Island. (5-4692.) Mr. Doddridge, speaking from observation, thinks that more passengers ride in the local coach than in the through. (4-3925.) And this is all we have on the subject.

So as the records stand we have no proof, but simply *presumption* against *presumption*. More cars per train in through travel than in local, hence we may have more passengers. But more capacity in the local car than in the through, and so we may have more passengers here.

BRANCH LINES.

Now as to the branch lines. The record shows that as to the Burlington Company these are interstate roads. How much of the travel on them is wholly within Missouri is not shown.

The branch lines carry both State and interstate passengers. How much of each? No evidence is furnished by the roads. The burden is on them.

That the local train makes more stops than the through is admitted, and as well that it does more switching. Frequent stopping and starting entails expense, and so does switching. But this, we shall insist, when we come to consider the quality of the service as affecting the rate, does not justify a higher rate for local travel.

It is insisted that there is more terminal service per passenger mile required for the local travel. Mr. Doddridge puts this expense at five cents per passenger. (4-3826.) He bases this on figures not made by himself, and for whose correctness he cannot vouch. (4-3894.) And nobody else does. As against this, however, is the fact that the expensive terminals are in the large cities, and the further consideration that all terminals, alike in city and county, exist as much for interstate as for State travel. And the uptown offices in the large cities, the offices in distant states not touched by the line of the railroad, the travelling passenger agents, the immense amount of advertising, are all used exclusively to attract competitive business. But Mr. Doddridge thinks State travel should be charged with this in like proportion as it is charged with other expenses, because the State is advertised through these agencies. (4-3878.)

PERSONAL INJURY LIABILITY.

The expense on account of personal injury is greater in the case of the local traveler, even where he is riding on a through train. Mr. Ellis gives an illustration of this in connection with a through train between Milwaukee and Lacrosse.

> "My question was, what additional expense is imposed upon train No. 1 by a passenger who gets upon that train at Milwaukee while it is waiting, ready to start, and who gets off that train at

Oconomowoc after the train stops there according to its schedule?

A. Now, let me ask you, Mr. Lehmann, do you mean what actual expense among those items we have apportioned exactly to the train?

Q. Of any kind whatsoever?

A. Well, the local passenger is one of the largest elements of risk to handle, and the local passenger on that train is a good deal more of an element of risk than the local passenger on the day train. *That train is made up with coaches at the rear, where, at a number of stations it stops, the platform may not reach back to them, unless it is an exceptionally long platform, and we have incurred out of the local traffic, before they get through, an element of risk that we have not with the through passenger who stays on the train.*" (Vol. 4, p. 4229.)

The train referred to is a night train, and undoubtedly if the man for Oconomowoc is debarked at a distance from the platform and must grope his way through the dark and along the side of the track, he may stumble and fall and hurt himself, which Mr. Ellis gravely observes would not happen if he remained on the train. And so he should pay more per mile of travel for the extra hazard imposed upon him.

Mr. Ellis might have found a much better example for his purpose. The local passengers on through trains usually ride in day coaches, and when an accident occurs, a collision, it may be, and no matter whether head end or rear, the heavy Pullman coaches crash through the frail fabric of the day coaches, and the great loss of life and the great number of serious injuries is found to be in the day cars, the passengers in the Pullman often escaping with slight

wounds or bruises and a severe shaking up. And this element of greater risk is to be charged into the mileage of those who must incur it and not the mileage of those who escape it, making passengers pay not for the protection which is afforded them, but for the peril to which they are exposed.

We had supposed that, as a rule, the longer the journey the more the baggage required. Mr. Ellis says, however, "the load of baggage is very much greater in the local than it is in the through travel." He explains (4-4222):

> "Q. Don't the great bulk of passengers travelling locally travel with a mere handbag?
>
> A. If you will go into any baggage car—
>
> Q. I would like to have that question answered.
>
> A. That is true.
>
> Q. Now you may proceed.
>
> A. Yes, because very few people carry baggage anywhere. But if you go into a baggage car at any time and check up the baggage piece by piece, you will probably find eight pieces in the local as compred with one in the through.
>
> Q. Due to the travelling man as he is called?
>
> A. Yes, sir.
>
> Q. And he travels on a two-cent rate?
>
> A. Yes, sir.
>
> Q. Doesn't he in Wisconsin?
>
> A. Yes.
>
> Q. And your three-cent passenger is the one who carries the least baggage as a rule, isn't he? *The fellow that pays you the most gets the least?*
>
> A. *Yes, sir.* Now, when you have got through with all that the total baggage expense doesn't amount to much. (4-4222.)

We are concerned here with rates fixed at two cents by legislative enactment and not with two-cent rates voluntarily granted by the company. It is hardly equitable to charge against the rates made by the law the cost of special service rendered to travel on low rates made by the company.

It would seem that the heavier, luxurious equipment and the added facilities of Pullman, parlor, buffet, dining and observation cars afforded the through travel would involve an expense as great as that entailed by some of the elements of inconvenience and discomfort of local travel noted by the company witnesses. But we are assured to the contrary. Mr. Ellis says (4-4215-16):

> "Q. Aren't they (parlor cars) operated on practically any road running between any two large points?
>
> A. I think so.
>
> Q. They all have parlor cars?
>
> A. I think practically all, yes.
>
> Q. And they are the special inducement that is held out to the through interstate passenger, aren't they?
>
> A. I don't know—well, yes, I think you can say they are.
>
> Q. And they are the most expensive passengers you have to haul, aren't they?
>
> A. Why, yes; a good deal more expensive.
>
> Q. Than any other kind.
>
> A. Yes, sir.
>
> Q. And the same thing is true of the Pullman passenger, isn't it?
>
> A. Yes.
>
> Q. They are very much more expensive than any others?

A. Oh, yes; very much more expensive; but, Mr. Lehmann, if you would take all passengers that ride into the Pullman and parlor cars and put them into the general result, on a general average, *I do not believe the total effect of them all on the final result would be one millionth of a mill.*"

Upon this no other comment is necessary than that it is expert testimony.

Here is a statute of the State of Missouri, enacted upon a subject which is undoubtedly within the scope of the State's powers and valid unless clearly shown to prescribe rates so low as to be tantamount to a confiscation of the property of the railroads.

Nothing specific is disclosed. Nothing beyond the opinions of interested witnesses that the cost of the service is somewhere from fifteen to a hundred per cent. more upon the basis of the revenue received than is the cost of some other service, which latter cost is not shown.

These are not sufficient showings to be made by the companies which have possession of all the information bearing upon the question, whose witnesses need not indeed charge their memories with all the details, but who were bound to have with them the figures that would support their contention. The legal presumption in favor of the statute is of no worth if it must yield to the mere conclusion of a single interested witness.

VII.

COST TO THE COMPANY IS NOT ALONE TO BE TAKEN INTO ACCOUNT. THE SERVICE RENDERED IS TO BE ALSO CONSIDERED IN DETERMINING THE PROPRIETY OF THE RATE. THE THEORY ADOPTED BY THE CIRCUIT COURT DISREGARDS THE QUALITY OF THE SERVICE AND BURDENS STATE BUSINESS WITH EXPENSES INCURRED FOR THE BENEFIT OF INTERSTATE BUSINESS AND WITH THE COST OF CONVENIENCES TO INTERSTATE TRAVEL WHICH RESULT IN INCONVENIENCE TO STATE TRAVEL, THUS CHARGING STATE TRAVELERS FOR DISSERVICE RATHER THAN FOR SERVICE, AND MAKING THOSE PAY MOST WHO GET LEAST.

It is not contended that there should be any discrimination in favor of State travel, but it is insisted that there is no right to discriminate against it. If the company for its own convenience and profit chooses to establish through trains and relegate the State travel to local trains, it may perhaps do so, but if the expense of conducting the local business considered apart is thereby increased, it cannot properly be imposed upon the local business, because the increase was not incurred for the benefit of that business.

The State which chartered the railroad company, in virtue of whose authority it exercises the power of eminent domain and the function of a common carrier, has the right to require that the interests of its people shall be considered and fully and fairly served. This Court, in Lake Shore R. Co. v. Ohio, 173 U. S. 285, l. c. 301, said:

"Certainly, the state of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers traveling through the state between points outside of its territory. 'The question is no longer an open one,' this court said in Cherokee Nation v. Southern Kansas Railway Co., 135 U. S. 641, 657, 'as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation. It is because it is a public highway and subject to such control that the corporation by which it is constructed and by which it is to be maintained may be permitted, under legislative sanction, to appropriate property for the purpose of a right of way, upon making just compensation to the owner, in the mode prescribed by law.' In the construction and maintenance of such a highway under public sanction the corporation really performs a function of the state. Smyth v. Ames, 169 U. S. 466, 544. The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the state might from time to time establish that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the state to take into consideration all the circumstances affecting passenger travel within its limits, and, so far as practicable, make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide

for the convenience of persons desiring to travel from one point to another in the state on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the state to places beyond its limits, or the convenience of those outside of the state who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who desired to pass through the state without stopping. Any other view of the relations between the state and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of stockholders, and without taking into consideration the interests of the general public. It would mean, not only that such directors were the exclusive judges of the manner in which the corporation should discharge the duties imposed upon it in the interest of the public, but that the corporation could so regulate the running of its interstate trains as to build up cities and towns at the end of its line or at a favored point, and by that means destroy or retard the growth and prosperity of those at intervening points. It would mean also that, beyond the power of the state to prevent it, the defendant railway company could run all its trains through the state without stopping at any city within its limits, however numerous its population, and could prevent the people along its road within the state who desired to go beyond its limits from using its interstate trains at all, or only at such points as the company chose to designate. A principle that in its application admits of such results cannot be sanctioned."

In Cleveland, etc., R. Co. v. Illinois, 177 U. S. 514, the right of the company to operate through trains, stopping only at such points as the company detetrmined was upheld, because it was admitted that the company furnished a sufcient number of regular passenger trains to accommodate all the local travel. The Court in no measure qualified its opinion in the Lake Shore case, but held that case to be clearly distinguishable. They said, p. 521:

> "While, as we held in the Lake Shore case, railways are bound to prov.de primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths, nor the excellence of their tables would insure them such share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demands this; the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it.

> "With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable and an infringement upon that provision of the Constitution which we have held requires that commerce between the states shall be free and unobstructed."

The bounden duty of the companies 'to provide primarily and adequately for those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road," as is in fact the cases here, will prove of small value to those to whom that duty is due if the cost of local travel is increased by the establishment of through trains with "the superior comfort of their coaches or sleeping berths and the excellence of their tables," and that cost is to be charged to the local traveler, for whose benefit it was not incurred, and who is denied the superior comfort of the coach and the excellence of the table. The primary obligation is thereby made secondary, and in less degree only than if entirely neglected. The benefits to which the people of the State are entitled are impaired if the price demanded for their bestowal is enhanced. Admit the principle that the local and through business may be separately conducted, and that the local business, reduced to such limits as the company may determine to be for its own pecuniary interest, must sustain its own charges as a distinct business, and there is a practical end of the obligation of the company to serve the people of the State which gave it life.

In Mo. P. Ry. Co. v. Kansas, 216 U. S. 262, the Board of Railroad Commissioners, upon the petition of residents along the line, directed the company to operate a passenger train over its Madison branch. The company refused obedience to the order, because the receipts from the business were insufficient to meet the cost of operation. The Court, following the Atlantic Coast Line case, 206 U. S. 1, held that the company could not thus excuse itself. The Court said:

> "The fact that the performance of the duty commanded by the order which is here in question may, as we have conceded for the purpose of the argument, entail a pecuniary loss, is, of course, as declared in the Atlantic Coast Line case, as a general rule, a circumstance to be considered in determining its reasonableness, as are the criteria indicated in the opinion in that case. But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation, as to all rights conferred upon it, and was devoid of obligations as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

The ruling of the Court, however, would be of no practical effect if the company could, regardless of the nature and value of the service rendered by it, impose a charge for that service sufficient to make it profitable.

The duty owing by the companies to the people of the State which chartered it must be performed so long as the corporate rights and powers which are the correlative of that duty are retained. And the duty is to render the service for a reasonable charge, the nature and the value of the service being considered. Cost is an element, but only an element to be considered with others, in the determination of what is a reasonable charge.

The right and duty of operating branch lines by each railway in Missouri were not thrust upon the companies, but voluntarily assumed by them. If the revenues are only one-half of the expenses and there is no prospect of improvement in the situation, the companies have made a bad purchase. But so long as they hold to the right, they must perform the duty, and they may not double their charges therefor simply that they may convert a bad bargain into a good one.

Rates for State passenger service should, under existing conditions, be less than for interstate. That there is a difference in the service, and that the difference is in favor of the interstate travel, because more of this is competitive, is recognized by the Court in Cleveland, etc., Ry. Co. v. Illinois, supra.

That State travel is in itself and under similar conditions more expensive than interstate, while asserted by the company in this case, is denied by the uniform course of railroad practice from the beginning. The contention now made has nothing to rest upon but the difference in average length of haul which for any purpose here involved is not of material consequence.

LENGTH OF HAUL.

Length of the haul has never been taken into the account anywhere in determining passenger rates. The charters of some of the early companies fixed a maximum, and did so on the mileage basis strictly. And the companies themselves, when free to act as they deemed just, unconstrained by law or by competitive conditions, did the same.

It does not require experts to determine the appropriate basis of charge. In the case of passenger traffic the measure of charge should be the service rendered. Who so gets the least and the poorest service should pay the least.

Passenger service is conducted on regularly scheduled trains. They set out from a given place at a given time, make prescribed stops, run upon a fixed time schedule to a certain destination.

Whosoever can accommodate himself to the prescribed stops can ride upon the train. He may journey from beginning to the end of the run, from an intermediate stop to the end of the run or from an intermediate stop to an intermediate stop.

The cost of his carriage per mile is not affected by the distance he rides, except as to the possible contingency of personal injury due to the larger element per mile of getting on and off the trains, and this is absolutely negligible. No one has ventured to ascertain it. The risk of injury from collisions or other accidents on the road is and can be no greater per mile in the case of short rides than in long ones.

TERMINAL CHARGES.

There is assumed to be a greater terminal cost per mile for short rides. That is for the same number of miles there is a greater use of terminal facilities and terminal service.

There is more sitting in the station, more lounging upon the platform and more buying of tickets.

But no stations are built exclusively for local use, and no ticket agents are employed exclusively for local service. No witness offers any figures on the subject—nothing but opinions. It is a fact, however, that if through passengers use terminals less per mile, they use more expensive terminals, for these are at the large centers of population and business. And all the expense of soliciting business is incurred in connection with through business. The local noncompetitive business needs no looking after of this kind.

The equipment for through business is everywhere more expensive. The local train is shunned because of its inferior accommodations and because it is sidetracked and subordinated in every way to the through trains.

There is an attempt to show that the local train has a greater expense per passenger mile than the through train, but that is nothing to the purpose, for the local carries State traffic and the through carries local traffic, and, besides, any greater cost per passenger mile of operating the local train results from the superior facilities afforded the through train.

The railroad companies, as common carriers, are in duty bound to carry passengers from and to any and all points between which they do business. The obligation is as binding in the case of one passenger as another. There may be discrimination in service only for public reasons and discrimination in charge cannot be justified for any reason.

In the early days of its history, all western roads ran perhaps one passenger train each day, each way over its road. This train made all the stops. No station was too insignificant for its attention.

When this was the case, it had no competition and was constrained by no law. It charged a flat rate per mile of travel. This charge expressed the opinion of its management of what was just. And it was demonstrably just.

The train set out at its appointed time and ran over its appointed course, stopping at every prescribed place, whether any one rode upon it or not. It was possible that a run would be made without a single passenger. It did not wait until it was ascertained that somebody wanted to ride upon it that day. It was assumed that somebody would use it.

Whether that train was filled with passengers or whether it ran with none, made no practical difference as to the expense of its operation. There was in either case the same number of cars, and the same number of operatives. The burden of human freight would add nothing of consequence to the work the engine had to perform and would not show itself in the final expense. The presence of passengers added a single element of cost, and that a very small one, that incident to the risk of personal injury.

If the train was used to some extent, as no doubt was universally the case, and the passengers were of all sorts, State and interstate, short distance and long distance, how should the expense of its operation and the added margin of profit be divided among them? The cost was incurred without regard to the use of it by any passenger in particular, and in like manner the right to the margin of profit existed. It added nothing to the cost to add to the number of passengers, unless the addition was to the very welcome extent of requiring more cars, which would diminish the cost per passenger mile. But take the usual case of the same equipment, and the number of passengers, and the distance traveled by each, made no difference in cost. How, then, we repeat, should that cost be divided? We answer that it should be in the measure of the service rendered to each.

This was the rule recognized in the early charters fixing a mileage rate; it was the rule recognized by the company

itself, when, free to do as it thought to be just and unconstrained by competition, it prescribed a mileage rate; it is the rule prescribed by the statutes of every state in the Union, and it is the rule which underlies the long and short haul provision of the interstate commerce law.

It is the just rule. For no part of the cost of operating the train has been incurred because of any particular passenger. It was all incurred whether he rode or not. There was a duty equal in its obligation to serve the local as well as the through passenger. The one was as essential to the prosperity of the company as the other. An exclusive through business is not desirable for a railroad company. Where it exists it means transit through a desert or over sterile mountains. Through business is finally made up of local business. Local business is country business. Through business is from city to city. But we cannot dispense with the country that lies between the cities, and why discriminate against it?

When we consider the problem in its primitive phases it is simple enough. With one train over the road each way each day, making all the stops, the case is plain. This was illustrated by the case of the Burlington branch lines which extend from St. Joseph, Missouri, one to Villisca, one to Creston and one to Chariton, the three last named towns being in the state of Iowa. On each of these branches there was one train, a daylight train each way, each day, stopping regularly at every station along the line and having the same class of cars for all passengers. The witness, Bethard, assistant general manager of the M., K. & T. Railroad, had difficulty in bringing himselfto acknowledge that the proper cost charge per passenger mile in such case would be the same, whether the travel of a passenger was wholly within either Iowa or Missouri, or whether it crossed the state line. (4-4091 to 4093.) But he finally agreed that there would not

be any difference in such case, and this was the view of the Court also.

The principle is not altered by the extension of the road and the growth and development of the country. Conditions of railroad travel between St. Louis and Chicago were originally as simple as they are now between St. Joseph and Villisca. When one train each way stopped at all the stations and did all the work, and there was no difference in the cars employed, the service rendered to each passenger being of the same kind, the rate was the same per mile to all, and it was so because the cost charge was properly so distributable. And this remained true, no matter how much the number of trains was increased, so long as each train was scheduled to make all the stops. The principle of the Interstate Commerce Law would forbid a greater charge for lesser travel. If that principle is a just one, it is applicable in this controversy, because of its justice. The law as law, as the expression of the sovereign will, has force only when State lines are crossed, but the principle is universal because it is just. And so long as there was but one railway between Chicago and St. Louis, nobody would think of applying anything but a uniform mileage rate, charging each passenger in the measure of the service rendered.

Other lines are built between the cities, and competition arises for travel between them, the intermediate points on each line being unaffected. One company, to secure a greater portion of this through travel, puts on what is called a through train, one which does not make all the stops, but only the county seats and larger towns. All who can, local as well as through travelers, naturally take this faster train. The other companies follow the example set, and not only do this, but make two, three or more of the trains through, until they have but one train for the limited local travel, which nobody uses except upon compulsion. The through

train is equipped with parlor, sleeping and dining cars; it runs on a faster schedule and is given the right of way. The local train is on a slow schedule, uses the cast-off cars of the through trains, takes the sidetrack whenever the through train comes along, and now for this inferior service it is proposed to impose a higher charge than for the better service.

And why? It is said to cost more. And how is this greater cost arrived at? The through trains, running between two large cities, which may be in different states, as Chicago and St. Louis, or in the same state, as St. Louis and Kansas City, having better accommodation and making better time, stopping at all the larger places on their line of run, and only at the larger places, get the larger portion of the total travel, State and interstate, and so considered apart may have a lower cost per passenger mile of the business done. But there are people who wish to go to or from the smaller places along the line at which the through trains do not stop. The volume of this business, State and interstate, is not so large as that done on the through trains between the cities and large towns, but the company may not neglect it; the law demands, from consideration of justice and the general welfare, and the interest of the company itself requires, that the people of the villages and of the way stations be served, and so the local trains are put on. The line has been stripped of the most and the best of its business by the through trains, and so there is comparatively little for the local train to do. For this reason the service is rendered through a train inferior in its equipment and accommodations, and inferior in its rights as against other trains, and yet because of the lesser volume of travel upon it, considered apart, the cost per passenger mile may be greater than in the cost of the through trains. And this greater cost for inferior service, it is insisted, shall be borne by the local service. The very reverse is the rule of justice, the very reverse is required by the

public nature of the functions which the railroad company has undertaken to perform. The equal right of the dwellers upon the farms and the villages cannot be otherwise secured.

The greater cost of local service is entailed for the benefit of the through business. For the benefit of the through travelers, the through trains have been established and the disparaged local passengers precluded from riding on them. For the benefit of the through travelers, the local train is established, with its cheap equipment, its lesser comforts and its greater perils. That the through traveler may fare with speed, comfort and safety, the local passenger is delayed, discommoded and inmperiled, and in the measure that he is stripped of the advantages he once enjoyed, the charges against him are increased.

And the discrimination may be carried to such extent, that some local trains may be established which, while stopping at all stations, serve so few people that their cost considered in and of itself is actually prohibitive, and the company's managers with a show of public spirit will say: these trains do not pay axle grease, but we operate them out of mere favor to the denizens of the little towns at which our profitable trains do not stop. They may believe themselves, but it is not true. They serve the little towns because they must, and they serve them in the meagre and factitiously expensive way they do because it profits them to do so. In very truth they rather slight than serve the small town, and the greater the slight the greater they would make the charge.

We do not complain of the discriminating service, whether it is the result of the mere stress of competition, or whether it is from a motive of greater good to the greater number. We recognize the right of the company to order the conduct of its business in such a way as to secure the greatest efficiency and economy in operation and render

the best service to the public as a whole. We do object, however, to the attempt to charge the cost of discrimination against those who suffer from it, rather than against those who are favored by it. We want human being treated as well in this respect as cattle are treated or as dead freight. Fast freight pays more than slow freight. Palace stock cars and refrigerator cars carry a higher rate than ordinary ones. Tea trains, fruit trains are charged more than coal trains. It is only in the passenger service that the best equipment is the cheapest, that the luxurious, well-cleaned and well-served Pullman cars cost less than the foul smelling, crowded half baggage and half passenger. It is only when they deal with men, women and children that the companies make those pay most who get least.

With similar equipment the local passenger can fairly be charged with his mileage proportion of the cost of operation, and with inferior equipment he should be charged less. To charge in this case the State traffic with the cost of operation on the basis of revenue is unjust, because the revenue per mile actually received from the State traffic is greater than that received from the interstate. To a certain extent, too, just how great is not shown, the State service is inferior. We may waive this, because the measure of inferiority is not clearly shown, and insist only that State service shall be charged with expenses in the measure of the use it makes of the property involved, that is upon the passenger mileage. Taking the statement of each road as a basis, and apportioning expenses upon the mileage basis, we have a very different result from that declared by the court.

IN CONCLUSION.

The burden was upon the companies to show by evidence, definite, competent and credible, by the facts of experience under it, of which the companies and the companies alone had knowledge, that the result of the law's operation was to confiscate their property. If the evidence is meager and insufficient, if it does not present the facts, and all the facts, essential to an intelligent comprehension and determination of the controversy, that is the fault of the companies, and they may not supply the want by the loose conjectures, elastic opinions or wholesale conclusions of interested witnesses. If as to any material matter we are, because of the absence of proof, driven to mere inference, if indulged at all, that inference must be in favor of the statute.

Aside from all this the examples worked out are sufficient to demonstrate beyond any doubt that each road receives more than a reasonable return on the fair value of the properties employed in State traffic.

VIII.

THE COMPANIES HAVE UTTERLY FAILED TO MEET THE RULE AND FURNISH THE PROOF. THEIR TESTIMONY IS NOT SUFFICIENT. THEY HAVE FAILED TO MAKE A FULL DISCLOSURE TO THE COURT AND HAVE NOT ATTEMPTED TO ACCOUNT FOR ENORMOUS EXPENSE ITEMS NOR TO ACCOUNT FOR ABNORMAL OPERATING EXPENSES.

We apprehend no disinterested man can read the record without saying the companies have failed to make the proof. That they have failed to prove the actual amount of its expenses for handling state and interstate freight, and made no effort to prove its actual expenses in handling state and interstate passenger traffic.

The rule of law requires them to do so, having failed to offer the proof or make a disclosure, the court cannot accept conjecture for the purpose of overturning the legislative enactment of a state. The fact is, the roads either did not have such expenses, or they were permanent and lasting improvements, which must be charged as an expense to the number of years, which would measure the lives of such improvements.

Can this court read the record and not have a doubt? A real, candid, substantial doubt. Can the court say that the complainants have presented cases which clearly show beyond all doubt and by evidence clear and convincing that the rates are confiscatory? Can the court say the complainants have met the requirements of this Honorable Court in such cases as we now present, and with extracts therefrom, as follows:

Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339, was a suit to annul a statute reducing passenger rates on the ground that its enforcement would prevent reasonable earnings on investments in property of the railroad. The amount of the operating expenses was stipulated by the parties, or stated by two witnesses, without disclosing fully the nature of the different items. In deciding this case, Justice Brewer said:

> "It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends." (*Chicago & Grand Trunk R. Co. v. Wellman,* 143 U. S. 345.)

In addition to this, Justice Brewer, in the case above cited, further said:

> "Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct the jury that an act fixing a maximum rate at two

> cents per mile is unconstitutional? Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings? * * * We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how carefully they should be to not declare legislative acts unconstitutional upon agreed and general statements, and *without the fullest disclosure of all material facts.*"

In the cases at bar the carriers stated in general terms what its gross receipts and operating expenses were. They have failed to make a full disclosure of what these operating expenses consist. They have not disclosed that material items thereof were reasonable or necessary. So far as the evidence in these cases is concerned, it does not present for the roads as strong a case as that presented by the stipulated facts in the case of *Chicago & Grand Trunk R. Co. v. Wellman supra.* The insufficiency of the evidence in the cases at bar is more glaring than the insufficiency of the testimony in the Wellman case. If the law could not be stricken down in the *Wellman Case,* on account of the insufficiency of the disclosure of facts made by the railroad company, it surely could not be stricken down in these cases.

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." (*San Diego Land & Town Co. v. National City*, 174 U. S. 739.)
>
> "The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind." (*Knoxville v. Knoxville Water Co.*, 212 U. S. 18.)
>
> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." (*Smyth v. Ames*, 169 U. S. 544, 547.)

It will be noted that the matter is limited in the one sentence to the *value of the property employed*, and in the other sentence to the *value of the services rendered*.

In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 54, the late Mr. Justice Peckham said:

> "Upon a careful consideration of the case before us, we are of the opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the Legislature of the state of New York are in fact confiscatory."

In *Knoxville v. Knoxville Water Co.*, 212 U. S. 16, Mr. Justice Moody said:

> "In the first place no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the federal courts. * * * Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.
>
> "But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

Not even the agreed statement of facts between witnesses of the parties will be conclusive for the court, as is clearly shown in the case of *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 345, wherein it is held:

> "Courts should be careful not to declare legislative acts unconstitutional upon agreed and general

statements, and without the fullest disclosure of all material facts."

In *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 343, Mr. Justice Brewer in his opinion says:

> "Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings? At any rate, must the court assume that it has no such effect; and ignoring all other considerations, hold, as a matter of law, that a reduction of rates necessarily diminishes the earnings?"

For the reasons presented, appellants respectfully ask that the final decrees and amended final decrees rendered in the circuit court in these and those cases which abide the results in these cases be reversed with instructions that the injunctions be dissolved and the original, amended and supplemented bills be dismissed.

Respectfully submitted,

ELLIOTT W. MAJOR,
Attorney-General, Attorney and Counselor for Appellants in the Appeals and Attorney and Counselor for Appellees in the Cross-Appeals.

FREDERICK W. LEHMAN,
SANFORD B. LADD,
Of Counsel.

APPENDIX.

FREIGHT RATE NO. 1. ACT OF 1905.

"AN ACT, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled 'Corporations, private,' by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter concerning railroad classification—charges—commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof."

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That section 1194 of the Revised Statutes of Missouri, 1899, concerning the regulation of freight charges, being part of article IV, of chapter 12, entitled "Corporations, private," be and the same is hereby repealed and the following, to be known as sections 1194, 1194a, 1194b, of said Revised Statutes, be enacted in lieu thereof, so that said sections shall be collocated between the existing sections 1193 and 1195 of said Revised Statutes of 1899.

Section 1194. No individual, company or corporation owning, operating, managing or leasing any railroad or part of railroad, designated in section 1191 as in classes A, B, or C shall demand, charge or receive a greater or higher rate for

carrying from initial to terminal points in this state articles named in the several classes herein designated, than is hereinafter provided for, namely: Class D, in carloads of 40,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class E, in carloads of 24,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class F, in carloads of 30,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, andn not exceeding one-half cent per hundred pounds for each additional 25 miles, or fractional part thereof. Class G, in carloads of 30,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles, or fractional part thereof. Class H, in carloads in common cars, measuring inside from 29 feet to and including 30 feet and 6 inches in length (to be known as standard cars) not exceeding $6.00

per carload for the first 25 miles, and not exceeding $3.00 per carload for the second 25 miles, or fractional part thereof, and not exceeding $2.00 per carload for each additional 25 miles, or fractional part thereof, of over twelve miles. For the carriage of any of the articles comprising class H in cars of other lengths for the distances above specified, the following percentages of the foregoing rates per carload shall not be exceeded, namely: In cars of length less than 29 feet, 94 per cent.; in cars of length over 30½ feet to and including 32 feet, 104 per cent.; in cars of length over 32 feet to and including 33 feet and 9 inches, 107 per cent.; in cars of length over 33 feet and 9 inches to and including 36 feet, 110 per cent.; in cars of length over 36 feet to and including 38 feet, 113 per cent.; in cars of length over 38 feet to and including 40 feet, 116 per cent.; in cars of length over 40 feet to and including 42 feet, 125 per cent.; in cars of length over 42 feet to an including 44 feet, 135 per cent.; in cars of length over 44 feet, 140 per cent. of the rates herein specified for cars of the standard length of 29 feet to and including 30 feet and 6 inches, shall not be exceeded. All the foregoing lengths to be taken by inside measurements. Class I, in carloads of 20,000 pounds minimum weight, not exceeding $14.00 per carload for the first 25 miles and not exceeding $2.00 per carload for the second 25 miles, or fractional part thereof, and not exceeding $2.00 per carload for each additional 25 miles, or fractional part thereof. (Class) In computing the rate of freight according to the provisions of this article, the distance shall be computed from the point

where it is received to the point of destination in the state, notwithstanding it may pass from one road to another.

Section 1194a. That for the violation of the foregoing sections the railroad company so offending shall forfeit and pay to any person thereby affected the freight rate charged, demanded, or received in excess of the rates prescribed in said section, together with all actual damages caused thereby, to be recovered in any court having jurisdiction thereof by the existing law. And if the plaintiff in such action recover judgment therein, the court shall treble the same, and the plaintiff shall, on motion, be allowed a reasonable attorney's fee for bringing the action.

Section 1194b. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies or the railroad and warehouse commissioners of this State in conflict with the provisions of this act are hereby repealed and declared void." (Missouri Session Acts 1905, p. 102.)

NO. 2.

THIS ACT WAS NOT MENTIONED IN THE ORIGINAL BILL OF COMPLAINT.

"An Act to amend article IV, chapter 12, of the Revised Statutes of Missouri of 1899, entitled 'Railroad classification, charges, commissioners,' by adding a new section thereto, to be known as section 1195a.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That article IV, chapter 12, of the Revised Statutes of Missouri of 1899, entitled 'Railroad classification, charges, commissioners,' be and the same is hereby amended by adding a new section thereto, to be known as section 1195a, to read as follows:

Section 1195a. No individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this State, shall charge for or receive for carrying a carload of forty thousand pounds of undressed stone, sand or building or paving bricks more than forty cents per ton for the first ten miles, twenty cents per ton for the second ten miles, or more than five cents per ton for each additional ten miles, and any excess in weight shall be charged for at the same rate per ton as for an even carload.

Approved April 14, 1905."

(Missouri Session Acts, 1905, p. 104.)

NO. 3.

THE FREIGHT RATE ACT OF 1907.

"AN ACT to repeal an act of the 43rd general assembly, approved April 15, 1905, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled 'Corporations, private,' by repealing section 1194 of said Revised Statutes, being part of article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections pro-

viding for the regulation of freight charged by railroads and the recovery of penalties for the 43rd general assembly, approved April 14, 1905, entitled 'An act to amend article IV, chapter 12, of the Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commissioners,'' by adding a new section thereto, to be known as section 1195a, fixing the charges for carrying undressed stone, crushed rock and building or paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194a-1, 1194b-1 and 1194c-1, providing for the regulation of freight charges by railroads and prescribing the punishment for a violation thereof, which new sections shall read as follows:

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That sections 1194, 1194a and 1194b of an act of the 43rd general assembly, approved April 15, 1905, concerning railroad classifications, charges, commissioners, and providing for a penalty for a violation thereof, said sections being enacted in lieu of section 1194, chapter 12 of the Revised Statutes of Missouri, 1899, in 'Corporations, private,' and section 1195a of an act of the 43rd general assembly, approved April 14, 1905, concerning railroad classifications, charges, commissioners, fixing charges for carrying undressed stone, crushed rock and building or paving brick, be and the same are hereby repealed, and the following, to be known as sections 1194, 1194a-1, 1194b-1 and 1194c-1 of said Revised Statutes are enacted in lieu thereof.

Section 1194. No individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1191 as in classes A, B or C, shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes and the commodities herein designated than is hereinafter provided for, namely: Class D, in carloads of 40,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class E, in carloads of 24,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class F, in carloads of 30,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class G, in carloads of 30,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hun-

dred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class H, in carloads, in common cars, measuring inside from 29 feet to and including 30 feet and 6 inches in length (to be known as standard cars), not exceeding $8.00 per carload for the first twenty-five miles, and not exceeding $4.00 per carload for the second twenty-five miles or fractional part thereof, and not exceeding $2.00 per carload for each additional twenty-five miles or fractional part thereof of over twelve miles. For the carriage of any of the articles comprising class H, in cars of other lengths for the distances above specified, the following percentages of the foregoing rates per carload shall not be exceeded, namely: In cars of length less than 29 feet, 94 per cent.; in cars of length over 30½ feet to and including 32 feet, 104 per cent.; in cars of length over 32 feet to and including 33 feet and 9 inches, 107 per cent.; in cars of length over 33 feet and 9 inches to and including 36 feet, 110 per cent.; in cars of length over 36 feet to and including 38 feet, 113 per cent.; in cars of length over 38 feet to and including 40 feet, 116 per cent.; in cars of length over 40 feet to and including 42 feet, 125 per cent.; in cars of length over 42 feet to and including 44 feet, 135 per cent.; in cars of length over 44 feet, 140 per cent. of the rates herein specified for cars of the standard length of 29 feet to and including 30 feet and 6 inches shall not be exceeded. All the foregoing lengths to be taken by inside measurements. Class 1, in carloads of 20,000 pounds minimum weight,

not exceeding $14.00 per carload for the first twenty-five miles, and not exceeding $2.00 per carload for the second twenty-five miles or fractional part thereof, and not exceeding $2.00 per carload for each additional twenty-five miles or fractional part thereof. For a carload of 40,000 pounds of minimum weight undressed stone, crushed rock, sand, railroad ties, cordwood, building or paving brick, not exceeding 40 cents per ton of 2,000 pounds to the ton for the first fifty miles or fractional part thereof, and not exceeding five cents per ton per carload for the next ten miles or fractional part thereof, and not exceeding 5 cents per ton per carload for each additional ten miles or fractional part thereof. In computing the rate of freight, according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the State, notwithstanding it may pass from one road to another.

Section 1194a. Any individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1194, or any officer, agent, representative or employe thereof who violates the provisions of section 1194 shall be adjudged guilty of a misdemeanor, and on conviction, shall be punished by a fine of not to exceed $5,000.00: Provided, that the money received from any fine under the provisions of this act shall be paid into the school fund in the county in which the case is prosecuted.

Section 1194b. This act shall not have the effect of relieving any person, partnership or corporation, owning or operating any railroad in this

state from any liability or penalty heretofore incurred for failure to comply with any law of this state.

Section 1194c. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void.

Approved March 19, 1907."

(Missouri Session Acts, 1907, pp. 171-3).

NO. 4.

ACT OF 1907 FIXING MAXIMUM RATES ON FRUIT IN CARLOAD LOTS.

"AN ACT to amend article 4, chapter 12, Revised Statutes of Missouri of 1899, by adding a new section thereto, to be known as section 1195a, and relating to freight charges and classifications.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That article 4, chapter 12, of the Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commissioners,' be and the same is hereby amended by adding a new section thereto, to be known as section 1195a, which said section shall read as follows:

Section 1195a. No individual, company or corporation owning, operating, managing or leasing any railroad or part of railroad in this state, shall charge for or receive for carrying apples and pears in carloads of 24,000 pounds minimum weight

more than six cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not more than one cent per hundred pounds for each additional twenty-five miles or fractional part thereof. For strawberries, peaches, grapes and other berries in carloads of 18,000 pounds minimum weight, not exceeding fifteen cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not exceeding two cents per hundred pounds for each additional twenty-five miles or fractional part thereof.

Sec. 2. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void.

Sec. 3. Any individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this state, violating the provisions of this act, shall, on conviction, be adjudged guilty of a misdemeanor, and subject to a fine not to exceed one thousand dollars for each offense.

Approved March 19, 1907."

(Missouri Session Acts, 1907, p. 187.)

NO. 5.

ACT OF 1907 PROVIDING FOR FREE TRANSPORTATION FOR SHIPPERS IN CERTAIN CASES.

"AN ACT to provide transportation on railroads for the shippers of freight in this state in carload lots.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Whenever any railroad company or corporation doing business within the limits of this state shall receive any live stock to be shipped over the said road or roads by carload lots, said corporation shall, in consideration of the price paid for said carload lots, issue to the shipper, his agent or employe, at the time of making out the contract or bill of lading, a round trip ticket to and from said points designated in said bill of lading, without further expense to said shipper, provided that the points of destination are within this state, and in case said point of destination is without this state, then said railroad corporation shall issue to such shipper, his agent or employe a round trip ticket to a point within this state nearest to the point without this state to which said shipment of live stock is shipped: Provided, that in case said shipper shall ship more than one carload at any one shipment the said railroad corporation shall not be compelled to give to said shipper more than one round trip ticket with such shipment, which said ticket shall be good on the freight train on which said stock is shipped, and on all trains on said road carrying passengers on the return trip, and shall be good for a period of ten days, and any railroad company or corporation willfully violating the provisions of this section, or which shall fail, neglect or refuse to furnish and deliver such ticket to such shipper, his agent or employee, shall forfeit and pay, as a penalty, to said shipper, not less than three hundred dollars nor more than five hundred dollars, to be recovered by civil action in any court of competent jurisdiction.

Approved April 4, 1907."

(Missouri Session Acts, 1907, p. 176.)

NO. 6.

THE PASSENGER RATE ACT OF 1907.

"AN ACT to repeal sectons 1191 and 1192 of chapter 12, artcle 4, Revised Statutes of Missouri, 1899, entitled 'Railroad classification—charges —commissioners,' by striking out sections 1191 and 1192, and enacting the following new sections in lieu thereof, to be known as sections 1191 and 1192 and 1192a.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That all of sections 1191 and 1192 of chapter 12, article 3 of the Revised Statutes of Missouri, 1899, be and the same are hereby repealed and three new sections be enacted in lieu theerof, to be known as sections 1191 and 1192 and 1192a, so that said sections shall read as follows:

Sections 1191. Roads classified.—All railroads in the state of Missouri are hereby divided into four classes, to be known as class A, class B, class C and class D. Class A shall include all through or trunk line railroads and all branch roads owned, leased, controlled or occupied by such through or trunk line railroad companies or corporations. Class B shall include all other railroads or parts of railroads owned, leased, controlled or occupied, or which may hereafter be owned, leased, controlled or occupied, either wholly or in part, by any trunk line company or corporation. Class C shall include all ther railroads of a greater length than forty-five miles. Class D shall include all roads less than forty-five miles in length not owned, leased, controlled or occupied by any trunk line company or corporation.

Section 1192. Passenger charges regulated.—Any individual, company or corporation owning, operating, controlling or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile, for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In classes A, B and C, not exceeding two cents per mile, and in class D, not exceeding four cents per mile: Provided, that no such individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under than one-half of the rate above prescribed; and provided further, that the rates for transportation herein prescribed may be reduced, as hereinafter provided.

Section 1192a. Any individual, company or corporation, or any agent or officer thereof, who shall violate any of the provisions of section 1192 of this act, shall be deemed guilty of a misdemeanor, and upon conviction, shall pay a fine of not less than one hundred nor more than five hundred dollars.

Approved February 27, 1907." (Missouri Session Acts, 1907, pp. 170-1.)

V

SUPREME COURT OF THE UNITED STATES

October Term, 1911.

130	Knott *et al.* v. C. B. & Q. R. Co.	MISSOURI RATE CASES.
134	C. B. & Q. R. Co. v. Knott *et al.*	
672	Knott *et al.* v. St. L. & S. F. R. Co.	
673	St. L. & S. F. R. Co. v. Knott *et al.*	
674	Knott *et al.* v. A., T. & S. F. R. Co.	
675	A., T. & S. F. R. Co. v. Knott *et al.*	
676	Knott *et al.* v. St. L. S. W. R. Co.	
677	St. L. S. W. R. Co. v. Knott *et al.*	
678	Knott *et al.* v. C. R. I. & P. R. Co.	
679	C., R. I. & P. R. Co. v. Knott *et al.*	
680	Knott *et al.* v. St. L., K. C. & C. R. Co.	
681	St. L., K. C. & C. R. Co. v. Knott *et al.*	
682	Knott *et al.* v. K. C. So. R. Co.	
683	K. C. So. R. Co. v. Knott *et al.*	
684	Knott *et al.* v. St. L. & Hannibal R. Co.	
685	St. L. & Hannibal R. Co. v. Knott *et al.*	
686	Knott *et al.* v. Mo. Pac. R. Co.	
687	Mo. Pac. R. Co. v. Knott *et al.*	
688	Knott *et al.* v. St. L., I. M. & S. R. Co.	
689	St. L., I. M. & S. R. Co. v. Knott *et al.*	
690	Knott *et al.* v. M. K. & T. R. Co.	
691	M., K. & T. R. Co. v. Knott *et al.*	
692	Knott *et al.* v. Q. O. & K. C. R. Co.	
693	Q., O. & K. C. R. Co. v. Knott *et al.*	
694	Knott *et al.* v. Wabash R. Co.	
695	Wabash R. Co. v. Knott *et al.*	
696	Knott *et al.* v. St. J. & G. I. R. Co.	
697	St. J. & G. I. R. Co. v. Knott *et al.*	
698	Knott *et al.* v. K. C., C. & S. R. Co.	
699	K. C., C. & S. R. Co. v. Knott *et al.*	
700	Knott *et al.* v. C. G. W. R Co.	
701	C. G. W. R. Co. v. Knott *et al.*	
702	Knott *et al.* v. C., M. & St. P. R. Co.	
703	C., M. & St. P. R. Co. v. Knott *et al.*	
704	Knott *et al.* v. C. & A. R. Co.	
705	C. & A. R. Co. v. Knott *et al.*	

Appeals Nos. 130, 672-704 (even numbers) and Cross Appeals No. 134 and Nos. 673-705 (odd numbers) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

STATEMENT.

1. THE APPEAL AND CROSS APPEAL.

(a) *Appeal in cases Nos.* 130, 672-704 (*even numbers*).

Cases Nos. 130, 672-704 inclusive (even numbers) are appeals by the Railroad Commissioners and Attorney General of Mis-

souri seeking to reverse decrees of the Circuit Court of the Western Division of the Western District of that state in favor of the eighteen railway companies operating trunk lines of railroad therein, enjoining the enforcement of the two-cent passenger and the freight carload maximum state statutory rates because as a matter of fact they were confiscatory.

(b) *Cross Appeal in cases No.* 134 *and Nos.* 673-705 (*odd numbers*).

Cases Nos. 134, 673-705 inclusive (odd numbers) are cross appeals in the same cases, seeking, as a matter of precaution, to have certain questions decided, other than those of confiscation, and to review the action below refusing to hold that the rates were invalid regardless of their confiscatory nature, so that the result below can also be maintained on grounds other than those there adopted.

(c) *How cases Nos.* 130 *and* 134 *came to be first docketed here.*

Although eighteen cases were tried below at the same time upon the same evidence, yet case No. 130 is an appeal from the decree in the single case of the Chicago, Burlington & Quincy Railroad Company. No. 134 is a cross appeal in the same case. Refusing to agree to any test case, the state attempted to bring here the case of that company before taking an appeal in the other cases; this presumably in order to obtain some imaginary advantage in having it first heard. Apparently it was thought to be the best case for its side so that a decision therein might have a favorable effect upon the other cases to be *thereafter*, within statutory time, appealed. The effort in this direction was frustrated in the manner hereinafter stated. In this way, however, these two cases appear here out of the order in which they were

tried below. This tends to, and has created confusion, to avoid which, this statement necessarily must go into some detail. The cases will be here presented exactly as they arose, were tried and decided below. In no other way can they be intelligently here considered and determined.

(d) *Numbers and names of the prevailing complainants in the eighteen cases here and below, with abbreviations commonly used and the order in which they were tried below, the even numbers representing the appeals by the state and the odd the cross appeals, except in the case of the C. B. & Q. R. R. Co.* (*Nos.* 130, 134).

These are. Here, Nos. 672, 673; below No. 2988, St. Louis and San Francisco Railroad Company (St. L. & S. F. R. Co.);

Here, Nos. 674, 675; below No. 2989, Atchison, Topeka and Santa Fe Railway Company (A. T. & S. F. R. Co.);

Here, Nos. 676, 677; below No. 2990, St. Louis Southwestern Railway Company (St. L. S. W. R. Co.);

Here, Nos. 678, 679; below No. 2991, Chicago, Rock Island and Pacific Railway Company (C. R. I. & P. R. Co.);

Here, Nos. 680, 681; below No. 2992, St. Louis, Kansas City and Colorado Railway Company (St. L. K. C. & C. R. Co);

Here, Nos. 682, 683; below No. 2993, Kansas City Southern Railway Company (K. C. S. R. Co.);

Here, Nos. 684, 685; below No. 2994, St. Louis and Hannibal Railway Company (St. L. & H. R. Co.);

Here, Nos. 686, 687; below No. 2995, Missouri Pacific Railway Company (Mo. Pac. R. Co.);

Here, Nos. 688, 689; below No. 2996, St. Louis, Iron Mountain and Southern Railway Company (St. L. I. M. & S. R. Co.);

Here, Nos. 690, 691; below No. 2997, Missouri, Kansas and Texas Railway Company (M., K. & T. R. Co.);

Here, Nos. 130, 134; below No. 2998, Chicago, Burlington and Quincy Railroad Company (C., B. & Q. R. Co.);

Here, Nos. 692, 693; below No. 2999, Quincy, Omaha and Kansas City Railroad Company (Q., O. & K. C. R. Co.);

Here, Nos. 694, 695; below No. 3000, Wabash Railroad Company (Wab. R. Co.);

Here, Nos. 696, 697; below No. 3001, St. Joseph and Grand Island Railway Company (St. J. & G. I. R. Co.);

Here, Nos. 698, 699; below No. 3002, Kansas City, Clinton and Springfield Railway Company (K. C., C. & S. R. Co.);

Here, Nos. 700, 701; below No. 3003, Chicago Great Western Railway Company (C. G. W. R. Co.);

Here, Nos. 702, 703; below No. 3004, Chicago, Milwaukee and St. Paul Railway Company (C., M. & St. P. R. Co.);

Here, Nos. 704, 705; below No. 3006, Chicago and Alton Railroad Company (C. & A. R. Co.).

(e) *Separate cases in which evidence was actually taken below, and stipulations as to those in which evidence was not taken.*

The record recites that *in the trial below*, but not with any saving of a right to an appeal, the case of the St. L. & S. W., No. 2990, here Nos. 676, 677, was (Rec., 4686) to abide that of the St. L., I. M. & S., No. 2996, here Nos. 688, 689; those of the Mo. Pac., No. 2995, here Nos. 686, 687, St. L., I. M. & S., No. 2996, here Nos. 688, 689, Wabash, No. 3000, here Nos. 694, 695, and C. & A., No. 3006, here Nos. 704, 705, were (Rec., 4712, 4713, 4723, 4724) to abide that of the Burlington, No. 2998, here Nos. 130, 134; those of the Q. O. & K. C., No. 2999, here Nos. 692, 693, and St. J. & G. I., No. 3001, here Nos. 696, 697, that (Rec., 4723, 4724) of the C. G. W., No. 3003, here Nos. 700, 701; and that of the C. M. & St. P., No. 3004, here Nos. 702, 703,

that (Rec., 4724) of the St. L. & S. F., No. 2988, here Nos. 672, 673. Thus of the eighteen roads cases of ten were actually tried, those of the C. R. I. & P., No. 2991, here Nos. 678, 679, and St. L. K. C. & C., No. 2992, here Nos. 680, 681, being by consent (Rec., 4686) consolidated for trial purposes, the title to the St. L. K. C. & C. property having in the meantime passed to the C. R. I. & P. Hereafter the two cases will, as was done below, be here dealt with as if they were a single case of the C. R. I. & P. Company.

The result is that appeals were unnecessarily taken in eight of the original cases, thereby also making eight unnecessary cross appeals. Hence, no consideration need be here given to cases Nos. 676, 677, 686, 687, 688, 689, 692, 693, 694, 695, 696, 697, 702, 703, 704, 705. This disposes of sixteen of the thirty-six cases here docketed and shows a total of 2182 printed pages, brought here at an unnecessary and enormous cost. These records can be laid aside because they require no attention.

There remain to be considered in the order the proceedings were had below, these appeals and cross appeals in the cases of ten companies: Nos. 672, 673 (St. L. & S. F.); 676, 677 (A. T. & S. F.); 678, 679, 680, 681 (C. R. I. & P. and St. L. K. C. & C., considered by consent as one case); 682, 683 (K. C. S.); 684, 685 (St. L. & H.); 690, 691 (M. K. & T.); 130, 134 (C. B. & Q.); 698, 699 (K. C. C. & S.); and 700, 701 (C. G. W.).

(f) *The record how printed, and an explanation of the references herein made thereto.*

(1) As already indicated, and hereinafter more fully explained, a determined effort was made by the state to obtain the judgment of this court in the C. B. & Q. case (Nos. 130, 134) before the other cases were brought here, although the entire

eighteen had been below tried together upon the same evidence with one finding of fact and one opinion applicable to all. To that end the record in the C. B. & Q. case (Nos. 130, 134) was first brought here, and filed September 13, 1909. That record consists of five large volumes comprising 5339 printed pages of which 133 pages (Rec., pp. 1-54, 61-94, 95-106, 114-116, 5240-5268) represent the pleadings, and proceedings in the C. B. & Q. cases alone; the remaining 5206 printed pages (Rec., pp 54, 58, 60-61, 94-95, 106-114, 116-213, 5268-5330) represent portions of the record common to the eighteen cases, including (Rec., p. 213) *all* the evidence taken in *all* the cases; of this evidence, 3651 printed pages (Rec., pp. 213-1462, 1464-2582; 2583-3685) were taken, *not at the trial*, but in a previously *abandoned* reference to a special master, in an inquiry under a law repealed before the trial; 2202 pages thereof (Rec., pp. 1464-2582; 2583-3685) were taken in the then pending cases of the Missouri Pacific (Nos. 686, 687) and Wabash (Nos. 694-695) neither of which were tried below. Although these 3651 pages of evidence taken before the master were, in lump, offered at the trial (Rec., p. 4637) at the close of the case of St. L. & S. F. R. Co. (No. 672, 673) yet in the preparation of the transcript they seem to have purposely been put *before* the evidence in the cases actually tried, which begins in volume IV, at page 3767. Substantially all of the evidence taken before the master has no bearing upon or relation to the cases as finally tried, because it was taken in a contest over a rate law, thereafter repealed, and because when the cases were finally tried, *agreed and test periods* were adopted to which *both* parties confined their proofs. The cost here of this unnecessarily encumbered record was in excess of $15,000.

(2) When the appeals in the other seventeen cases were taken, it was stipulated that since the evidence was already here in the transcript in cases Nos. 130, 134, it need not be again incorpor-

ated in any one of the other transcripts. (Stipulations, Rec. Nos. 672, 673, p. 235; Nos. 674, 675, p. 237; Nos. 676, 677, p. 220; Nos. 678, 679, p. 234; Nos. 680, 691, p. 234; Nos. 682, 683, p. 225; Nos. 684, 685, p. 217; Nos. 686, 687, p. 261; Nos. 688, 689, p. 250; Nos. 690, 691, p. 266; Nos. 692, 693, p. 233; Nos. 694, 695, p. 226; Nos. 696, 697, p. 222; Nos. 698, 699, p. 218; Nos. 700, 701, p. 234; Nos. 702, 703, p. 216; Nos. 704, 705, p. 221.)

(3) In these transcripts were contained and thereafter printed duplications of the requests for findings, the statements of the experts, the opinions of the court and findings of facts as well as many of the orders already appearing in the C. B. & Q. record (Cases Nos. 130, 134). In this statement, therefore, the references to the requests for findings, the joint statement of experts, the evidence, findings of fact and opinions of the court below will only be to the five volumes in the C. B. & Q. cases (Nos. 130, 134). There will be frequent references thereto, but little necessity for any to the record in the other cases. This, because the pleadings and decrees, as to which there is no serious complaint, are not substantially different. Hence, whenever there is herein used the simple abbreviation "Rec.", this will mean to the same record as contained in the five volumes as they appear in the C. B. & Q. cases, Nos. 130, 134. When special reference is made to any of the other cases, it will be by the abbreciation "Rec. Nos. ... ..." followed by the insertion of the numbers of the appeal and cross appeal of the particular case to which reference is then made. If when the same matter appears in the record of one of the seventeen cases and also in that of th C. B. & Q. (Nos. 130, 134) it will be more convenient to refer to the latter and this will be done by the abbreviation "Rec."

(g) *Substitution of parties pending the litigation.*

When the original bills were filed, Joseph P. Rice was one of the Railroad Commissioners (Bill, Rec., 3; Answers, Rec., 28, 38) and H. R. Oglesby was elected (Amended Bill, Rec. 63, par. 3; Answers, Rec., 96, 103, 104) as his successor, and in his stead substituted (Rec., 61, par. 1) as a defendant. References to the bills and answers in cases other than the C. B. & Q. hereafter appear (*Infra* Div. 9, 12) and therein such matters are set forth.

The interest of the Chicago, Burlington & Quincy *Railway* Company, lessee, the original complainant below, passed, pending the litigation, to the Chicago, Burlington & Quincy *Railroad* Company, its lessor, and Elliott W. Major succeeded Herbert S. Hadley as Attorney General. By consent, orders (Rec. 114, 115, 172) were entered after the court, under a stipulation, (Rec. 114) dispensed with the master, substituting such parties as such successors, with the same effect as if the bills had been originally for the one against the other.

(h) *Findings of fact and decrees.*

The court below made one finding of fact (Rec. 5305-5327, 168 Fed. Rep. 317, 319-337) and filed opinions (Rec. 5286-5304, 168 Fed. Rep. 317, 356; Rec. 5327-5330) covering all the cases though a separate decree was upon March 8, 1909, entered as to each complainant, which, upon motion at the same term, on April 17, 1909, was modified in some minor respects (Rec. 5241-5243; 5244-5245; 5245-5246; Nos. 672, 673, pp. 204, 210; Nos. 674, 675, pp. 207, 212; Nos. 676, 677, pp. 194, 199; Nos. 678, 679, pp. 204, 210; Nos. 680, 681, pp. 203, 209; Nos. 682, 683, pp. 196, 201; Nos. 684, 685, pp. 191, 197; Nos. 686, 687, pp. 229, 236; Nos. 688, 689, pp. 221, 227; Nos. 690, 691, pp. 235, 241; Nos. 692, 693, pp. 201, 206; Nos. 694, 695, pp. 197, 203; Nos. 696, 697, pp. 191-197; Nos. 698, 699, pp. 191, 197; Nos. 700, 701, pp. 202, 208; Nos. 702, 703, pp. 188, 194; Nos. 704, 705, pp. 195, 201).

(i) *Appeals were first taken in the C. B. & Q. cases (Nos. 130, 134) which were advanced and heard.*

The state, in the C. B. & Q. cases (Nos. 130, 134) upon July 28, 1909, took an appeal (Rec. 5265-8) from the original decree of March 22, 1909, as modified April 17, 1909. The C. B. & Q. R. Co. in September, 1909, took (Rec., 5334) a cross appeal, the cases being here docketed (Rec. Title page) upon September 22, 1909, and are now numbered 130, 134. In April 1910, the state moved for and obtained an order for the advancement, over the vigorous protest of the company that an unfair advantage was sought in pressing this and holding back the other seventeen cases tried with it. Cases Nos. 130, 134, were, upon October 13, 1910, argued and submitted, the company again in oral argument protesting against the advantage which it thought the state was unduly seeking to obtain in presenting one case out of eighteen.

(j) *Subsequent appeals of the other seventeen cases.*

The decrees in all the cases were first entered March 22, 1909, and slightly amended upon April 17, 1909. Immediately prior to the expiration of the two years in which to appeal, the state, having waited till almost the last moment, in March 1911, applied for and was granted an appeal in each of the other cases, whereupon a cross appeal was granted to each railroad company. (Rec. Nos. 672, 673, pp. 229, 234; Nos. 674, 675, 231, 236; Nos. 676, 677, pp. 214-219; Nos. 678, 679, pp. 228, 233; Nos. 680, 681, pp. 228, 233; Nos. 682, 683, pp. 219, 224; Nos. 684, 685, pp. 212, 216; Nos. 686, 687, pp. 255, 260; Nos. 688, 689, pp. 244, 249; Nos. 690, 691, pp. 261, 266; Nos. 692, 693, pp. 227, 232; Nos. 694, 695, pp. 220, 225; Nos. 696, 697, pp. 216, 221; Nos. 698, 699, pp. 212, 217; Nos. 700, 701, pp. 228, 232; Nos. 702, 703, pp. 210, 215; Nos. 704, 705, pp. 216, 221.)

All these seventeen cases are now also here docketed, the appeals and cross appeals therein making the thirty-four cases, numbered 672 to 705 inclusive. Each even number represents the state's appeal and the succeeding odd number the cross appeal in the same case.

(k) *Prompt action by the railroads.*

Immediately upon the taking of the appeals in these other cases, the C. B. & Q. R. Co. whose case (Nos. 130, 134) was still here under advisement, filed a motion setting forth the foregoing facts and asking that the submission be set aside and its case restored for argument with the other seventeen cases so that the entire rate situation in Missouri would be before the court at the same time. This motion was denied upon April 3, 1911, but upon the following Monday, April 10, 1911, the court, of its own motion, set aside the submission of the C. B. & Q. case (Nos. 130, 134) and restored it for argument, thereby doing of its own volition that which the railroad company had asked.

(l) *Advancement of all the cases.*

Upon October 9, 1911, the state filed a motion to advance the C. B. & Q. case (Nos. 130, 134) to which the company filed suggestions that the motion should not be sustained unless the other seventeen cases were advanced and heard at the same time. All the seventeen railroad companies filed a joint motion in their cases (Nos. 672-705) asking their advancement to be heard with the C. B. & Q. case (Nos. 130, 134). The court upon October 10, 1911, made an order advancing the thirty-six cases and setting them for hearing upon January 8, 1912, which date was thereafter changed to February 19. 1912.

(m) *The unnecessary confusion produced by so many transcripts should be avoided.*

Before $8400 was deposited to print the additional records in the seventeen cases, the railroad companies vainly tried to obtain from the state a stipulation to the effect: The bills were, except as to amounts and descriptions of railroads which appeared in the findings and evidence, like that in the C. B. & Q. case (Nos. 130, 134); the decrees were in form substantially alike in all cases; all the evidence, the findings of fact and opinion in all the cases appeared in the record of the C. B. & Q. case; hence, the transcript in none of the cases need be printed but the cases could be submitted upon such stipulation and the record as it was made in the C. B. & Q. case (Nos. 130, 134). The state, in excess of caution, feared the right under the present rules to make any agreement, hence the entire records in the other cases were printed.

In preparing this brief, consideration must necessarily at times, be given to the records in all the cases inasmuch as they are printed. It is, however, to be hoped that these cases, requiring the unnecessary expenditure of over $24,000 to print the records, will prove a forceful reason why the court, when formulating its new equity rules, shall adopt one permitting such shortening of records upon appeal as will not only be in the interest of economy but also require a record to be so abbreviated or abstracted as will permit an intelligent consideration thereof.

With these preliminary suggestions we pass to a more detailed consideration of the cases presented. This brief, and the appendix thereto will cover all the cases, so that no reference need be made to those filed heretofore in the C. B. & Q. case.

2. ORIGINAL BILLS.

(a) *Act of* 1905.

By the general laws (Rev. Sts. 1899, art. 4, chap. 12) of Missouri, as amended in 1903 (Laws Mo. 1903, p. 132; Bill, Rec. 5-6; Appendix 1) the Railroad Commissioners were empowered to fix, modify or reduce all railroad freight rates. The maximum passenger rate (Rev. Sts. Mo. 1899, Secs. 1192, 1193) was three cents per mile. The only limit to these rates was the state constitutional requirement (Const. Mo. art. 12, par. 14) that all rates should be reasonable. In 1905, the legislature fixed (Laws, Mo. 1905, p. 102; Rec. 6-7; Appendix 2) maximum mileage rates upon practically all carload freight by an act which took effect June 16, 1905 (Const. Mo. art. 4, sec. 36; Bill, Rec. 7-8; Ans. Rec. 29).

(b) *Governor's reluctant approval of the act of* 1905.

The Governor of the state in an elaborate apologetic written approval of the act of 1905 (Rec. 2450, Ex. 54) practically conceded that there had been no legislative investigation of the facts and that the rates fixed were unjust. He thought, however, that it was his duty not to veto the bill so that the railroads would be in a position to judicially test the validity of the rates fixed, the result of which would be that in the light of the evidence taken therein, the commissioners or the next legislature could correct any injustice by fixing new rates. This invited the litigation which ensued. The invitation was by the railroads accepted upon the assumption that it was to the interest of all, in good faith, to have such an investigation.

(c) *Filing of the original bills.*

Upon June 16, 1905, the eighteen railroad companies operating trunk lines in Missouri filed bills to enjoin the enforcement of the act of 1905 (Rec. 1-14; Rec. Nos. 672, 673, pp. 2-18; Nos. 674, 675, pp. 2-15; Nos. 676, 677, pp. 2-16; Nos. 678, 679, pp. 2-17; Nos. 680, 681, pp. 2-16; Nos. 682, 683, pp. 2-14; Nos. 684, 685, pp. 2-15; Nos. 686, 687, pp. 2-17; Nos. 688, 689, pp. 2-18; Nos. 690, 691, pp. 3-27; Nos. 692, 693, pp. 3-16; Nos. 694, 695, pp. 2-15; Nos. 696, 697, pp. 2-15; Nos. 698, 699, pp. 2-15; Nos. 700, 701, pp. 2-15; Nos. 702, 703, pp. 2-15; Nos. 704, 705, pp. 2-15.) The Chicago, Burlington & Quincy *Railroad* Company, the party *now* involved in cases Nos. 130, 134, did not file a bill, but the *then* complainant was the Chicago, Burlington & Quincy *Railway* Company, a lessee. The lease was thereafter canceled and the *Railroad* Company was (Rec. 114, 115) by consent, upon June 20, 1908, substituted as complainant. The defendants to the bills were the Attorney General and Board of Railroad Commissioners, who, as part of their general official duties, were required to enforce the act, and certain individual shippers, representatives of the class of persons really interested and to whom accrued the penalties provided. The reason for joining the shippers was that they were clearly the real parties in interest (*M. K. & T. R. Co.* v. *Hickman,* 183 U. S. 53, 60, 61, 46 L. Ed. 78, 84.) The act had omitted to specifically require any officer to enforce it. At that time it was claimed by some that *Smyth* v. *Ames,* 169 U. S., 466, 42 L. Ed. 819 had been so modified by *Fitts* v. *McGhee,* 172 *U. S.* 516, 42 L. Ed. 535, that such omission prevented a suit against the Attorney General or Railroad Commissioners, as it would be one against the state, even though the general duties of these officers required them to act. If, therefore, the court had so held, the action could nevertheless have been maintained against the shippers, and in case the law had been declared invalid, it would have bound the entire class (*Wallace* v. *Adams,* 204 U. S., 415,

425, 51 L. Ed., 547, 562; *West* v. *Randall,* 2 Mason, 93, 29 Fed. Cas., 718, 722, No. 17428.) Since then it has been decided (*Ex Parte Young,* 209 U. S., 123, 52 L. Ed., 714; *Hunter* v. *Wood,* 209 U. S. 205, 52 L. Ed. 747) that there is nothing in the point, so that it will be unnecessary to give special consideration to the subject, especially since these parties were conditionally dismissed and declined to appeal (Decrees, par. 4, Rec. 5248, 5249-5256; Nos. 672, 673, pp. 204, 210; Nos. 674, 675, pp. 207, 212; Nos. 676, 677, pp. 194, 199; Nos. 678, 679, pp. 204, 210; Nos. 680, 681, pp. 203, 209; Nos. 682, 683, pp. 196, 201; Nos. 684, 685, pp. 191, 197; Nos. 686, 687, pp. 229, 236; Nos. 688, 689, pp. 221, 227; Nos. 690, 691, pp. 235, 241; Nos. 692, 693, pp. 201, 206; Nos. 694, 695, pp. 197, 202; Nos. 696, 697, pp. 191, 197; Nos. 698, 699, pp. 191, 197; Nos. 700, 701, pp. 202, 208; Nos. 702, 703, pp. 188, 194; Nos. 704, 705, pp. 195, 201.) No question as to their joinder can therefore here arise (*Joy* v. *St. Louis,* 138 U. S. 1, 34 L. Ed. 843, 858.)

3. Original Restraining Orders and Temporary Injunctions.

A short restraining order in each case was issued (Rec. 15; Nos. 672, 673, p. 18; Nos. 674, 675, p. 15; Nos. 676, 677, p. 16; Nos. 678, 679, p. 17; Nos. 680, 681, p. 16; Nos. 682, 683, p. 14; Nos. 684, 685, p. 15; Nos. 686, 687, p. 17; Nos. 688, 689, p. 18; Nos. 690, 691, p. 27; Nos. 692, 693, p. 16; Nos. 694, 695, p. 15; Nos. 696, 697, p. 15; Nos. 698, 699, p. 15; Nos. 700, 701, p. 15; Nos. 702, 703, p. 15; Nos. 704, 705, p. 15) the hearing upon which *at the request* of the Attorney General, was (Rec. 16) continued until a later date (the order being continued in force), when the application for an injunction was submitted upon the face of the bill, without controversy as to the facts, whereby was conceded

the fact that the rates were confiscatory (Opinion, Appendix 8). A temporary injunction was granted, the defendants *consenting* that the complainant without surety could sign a nominal injunction bond (Orders for Temporary Injunctions Rec., 19; Nos. 672, 673, p. 23; Nos. 674, 675, p. 20; Nos. 676, 677, p. 19; Nos. 678, 679, p. 21; Nos. 680, 681, p. 20; Nos. 682, 683, p. 19; Nos. 684, 685, p. 20; Nos. 686, 687, p. 40; Nos. 688, 689, p. 38; Nos. 690, 691, p. 33; Nos. 692, 693, p. 21; Nos. 694, 695, p. 20; Nos. 696, 697, p. 19; Nos. 698, 699, p. 20; Nos. 700, 701, p. 19; Nos. 702, 703, p. 18; Nos. 704, 705, p. 19). This at least carried out the spirit of the Governor's written approval (Rec. 2450, Ex. 54) of the act, inviting litigation to test the validity of the rates fixed so as to enable the commission or the next legislature to correct any injustice in the light of the evidence which might be therein adduced.

4. The Original Bills Put at Issue.

Like demurrers to all the bills were interposed, argued and denied, after which similar answers and replications were filed, the Attorney General in each case appearing as the counsel for the shippers as well as the other parties. (Demurrers, Answers and Replications, Rec. 21-26; 27; 28-43; 47-50; Nos. 672, 673, pp. 25-56; Nos. 674, 675, pp. 21-55; Nos. 676, 677, p. 22-50; Nos. 678, 679, pp. 23-53; Nos. 680, 681, pp. 22-53; Nos. 682, 683, pp. 20-49; Nos. 684, 685, pp. 26-47; Nos. 686, 687, pp. 44-82; Nos. 688, 689, pp. 41-80; Nos. 690, 691, pp. 34-74; Nos. 692, 693, pp. 22-56; Nos. 694, 695, pp. 21-53; Nos. 696, 697, pp. 21-44; Nos. 698, 699, pp. 21-45; Nos. 700, 701, pp. 21-51; Nos. 702, 703, pp. 20-43; Nos. 704, 705, pp. 21-51).

5. Reference of the Original Cases.

The state filed in each case a motion for a reference to a special master (Rec. 53; Nos. 672, 673, p. 57; Nos. 674, 675, p. 56; Nos. 676, 677, p. 52; Nos. 678, 679, p. 54; Nos. 680, 681, p. 54; Nos. 682, 683, p. 50; Nos. 684, 685, p. 47; Nos. 686, 687, p. 83; Nos. 688, 689, p. 81; Nos. 690, 691, p. 80; Nos. 692, 693, p. 57; Nos. 694, 695, p. 54; Nos. 696, 697, p. 46; Nos. 698, 699, p. 46; Nos. 700, 701, p. 52; Nos. 702, 703, p. 45; Nos. 704, 705, p. 52). Complainants in the eighteen cases filed (Rec., 53) motions to set the cases down for hearing upon (Rec., 53-55) oral evidence under Rule 67 as amended (149 U. S. 793.) The method of trial was discretionary (*Peoria Gas Co.* v. *Peoria*, 200 U. S., 48, 57, 50 L. Ed. 365, 367; *Brown* v. *Grove*, 25 C. C. A., 644, 80 Fed. Rep., 564, 566.) There was ample precedent for the request of complainants, for nearly every previous rate case had been tried by the court without a reference. (*Ames* v. *Union Pac. R. Co.*, 64 Fed. Rep., 165; *Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819; *C. M. & St. P. R. Co.* v. *Tompkins*, 90 Fed. Rep. 363; *Milwaukee R. & L. Co.* v. *Milwaukee*, 87 Fed. Rep. 577; *San Diego Land & Town Co.* v. *Tasher*, 110 Fed. Rep. 702, s. c., 189 U. S. 439, 47 L. Ed. 892; *San Diego Land & Town Co.* v. *National City*, 74 Fed. Rep., 79; s. c. 174 U. S. 739, 43 L. Ed. 1154; *Flume Co.* v. *Swither*, 2 C. C. A. 548, 90 Fed. Rep. 164; 44 C. C. A. 143, 104 Fed. Rep. 706; *San Joaquin & Kings River Canal & Irrigation Co.* v. *Stanislais County*, 113 Fed. Rep. 930, s. c., 192 U. S. 201, 48 L. Ed. 406; *Boise City Irri. & Land Co.* v. *Clark*, 65 C. C. A. 339, 131 Fed. Rep. 415.)

The court below, however, ordered (Rec. 56, 57) that the causes be referred to Hon. Frank L. Schofield, to hear, until further orders, such of the cases as the parties should "at the beginning of the inquiry agree to be heard." There was some controversy (Rec., 3696-3732) as to the number of cases which should in

the first instance be tried, but the evidence upon the original bills was agreed to be first taken in the cases of the C. B. & Q., No. 2998 below, 1234 printed pages (Rec., 229-1463), Mo. Pac., No. 2995 below, 1118 pages (Rec., 1464-2582), and Wabash, No. 3000 below, 1103 pages (Rec., 2583-3686), the master fixing (Rec., 93), June 18, 1907, as the time for the argument before him of these cases. Beyond the return of the evidence pursuant to order (Rec., 114) of court, *made by consent* (id.) nothing more was done by him. No question arises as to the reference, because the parties afterwards *agreed* to (Rec., 114, 169, 213), and did try the cases before the court upon oral evidence, and that theretofore adduced before the master, this after the original act of the legislature had been repealed and new acts substituted.

6. Appeal of Governor for New Laws.

An enormous amount of evidence was taken before the master, though in three of the cases only, fairly indicating that the rates fixed by the act of 1905 could not be upheld. The legislature of the state then met for its 1907 session. The Governor in his general message (Rec., 2449, 2550, Exhibit 53) to that body, and afterwards in a special message (id. Exhibit 52) urged some changes in the act of 1905 because it was defective with respect to penalties and had been to some extent shown by the evidence to be illegal and unjust. He also submitted a report (Appendix hereto No. 9) of the then Attorney General to the same effect, which also suggested a scheme of so fixing the law that resort could not be had to the federal courts to test the validity of the rates to be fixed. He thus receded from the invitation (Exhibit 54, Rec., 2450) he had extended and which had, in good faith, been accepted by the institution of these cases below.

7. PASSAGE OF THE ACTS OF 1907.

(a) *The freight acts.*

The legislature then passed a new maximum freight carload rate act (Laws Mo. 1907, p. 171; Amended Bill, 64-66, Appendix 3) increasing in some respects the rates fixed by the act of 1905, lowering them in some instances, creating very severe additional penalties, and repealing all of the prior act, *except the penalties* incurred thereunder, *thus making it necessary to continue the litigation as to the old act,* though there should have been no question that its efficacy was at an end (*Dinsmore* v. *Express Co.*, 183 U. S. 115, 46 L. Ed. 111) nor that it was void so far as concerned the penalties imposed (*Ex Parte* Young, 209 U. S. 123, 52 L. Ed. 714; *Hunter* v. *Wood*, 209 U. S. 205, 52 L. Ed. 747; *Willcox* v. *Cons. Gas Co.*, 212 U. S. 19, 53 L. Ed. 382), and that no penalty could have accrued while its enforcement was enjoined. This act of 1907 added stone as one of the commodities, the rates upon which were fixed, it having been covered with a different rate by a former separate act (Laws Mo. 1905, p. 104, Rec., 62). Still another act fixed the rates per carload of fruits (Laws 1907, pp. 187, 188; Rec., 66-67.) Another act (Laws 1907, p. 176; Rec., 67) required shippers of carload lots to be carried free. The state court has since held (*McCully* v. *R. Co.*, 212 Mo. 1) the latter act to be void and beyond the power of the state to pass, it unreasonably requiring a service without compensation. The reduction in state freight rates was quite large. That of the C. B. & Q. under the act of 1905, exclusive of that on stone and fruit, was (Rec., 238) $171,122.07, as against (Finding 19, Rec., 5324) $112,533.71 under the act of 1907. The state rate (Finding 3, Rec., 5306, 5307) necessarily fixed the interstate and the annual reduction in the earnings from interstate upon the C. B. & Q. (Ev. Sturgis, Rec., 4746, 5098, Exhibit 101) aggregated $477,647.79 under the act of 1907, and under the act of 1905, $700,487.29.

The reduction of the state freight earnings by the act of 1905 appears as to the only two other roads as to which evidence was taken at the time when there was a controversy over that law. Upon the Missouri Pacific it was (Rec. Vol. III, pp. 2459, 2460, Exhibit 56) $74,800.09; upon the Wabash (Rec. Vol. III, p. 3325, Exhibit 2) $36,574.10. It does not appear in detail as to other than these three roads because it was conceded (Ev. Taliaferro, Rec., 4409, 4566) by the state that it was more under the act of 1905 than under that of 1907, the amount as to which was in the case of each road shown, and because at the final trial agreed test periods were taken by both sides to test the laws of 1907. The actual diminution of state freight earnings under the act of 1907 as to the roads whose cases were tried was stated by the railroad auditors, conceded by the state experts and specially found (Rec., 5318-5326) by the court for an agreed test period, so that the loss per year, as against the then existing low state freight rates, became a mathematical calculation, and may be thus tabulated:

Case No.	Road	Test Period	Amount	For one year
672-3	St. L. & S. F.	3 mos.	$11,389.27	$45,557.08
674-5	A. T. & S. F.	6 "	13,885.87	27,771.74
678-81	C. R. I. & P.	3 "	9,989.43	39,957.72
682-3	K. C. S.	6 "	2,957.58	5,915.16
684-5	St. L. & H.	12 "	15,126.02	15,126.02
690-1	M. K. & T.	6 "	20,222.85	40,445.70
130-4	C. B. & Q.	12 "	112,533.71	112,533.71
698-9	K. C. C. & S.	12 "	2,970.21	2,970.12
700-1	C. Gt. W.	6 "	1,893.41	3,786.82
Total				$294,064.07

The proofs of these figures clearly appeared from the evidence of the auditors and were by the state's experts in each instance admitted in their statements. At the close of the trial the court by consent of all parties ordered (Finding 14, Rec. 5312; Order, Rec. 174) that two experts from each side compile the figures upon each of the theories presented. As to this diminution, the experts in their report (Rec. 175-212) absolutely agreed to the figures thus set forth. This becomes quite significant when it is borne in mind that the short distance between the rivers made the east and west rates in Missouri unreasonably low. In other words: The statutory state freight rates were upon a mileage basis. The great volume of state traffic was to and from, and between St. Louis and Mississippi river points upon the east side of the state and Kansas City and Missouri river points upon the west. The short distance between the rivers was 198 miles. The distance from St. Louis to Missouri river points was nearly 300 miles. So that upon the state mileage rates, the companies could only earn the rate for 200 miles but were put to the expense of operating 278 to 300 miles (Finding 3, Rec., 5306-7). So that if a road operated upon the basis of 70% of its gross earnings, it would actually lose money in carrying 300 miles when it was only paid therefor on the basis of 198. More in detail upon this subject will be hereafter said. In the same way interstate rates in far greater amounts were likewise reduced, because as specially found (Finding 3 Rec., 5306, 5307) the state rates *necessarily* fixed the interstate.

(b) *Passenger act.*

The same legislature fixed an arbitrary passenger rate (Laws Mo. 1907, p. 170; Bill, Rec. 69-70) of two cents per mile, which was specially found to have actually reduced (Rec. 5313, Finding 14) the state and interstate passenger annual revenue, the latter being the necessary result of the state law (Finding 3, 5306, 5307), in these sums:

Name of Road	State	Interstate
St. L. & S. F. R. R.	$666,008.72	$509,780.63
A. T. & S. F. R. R.	30,885.52	66,271.03
C. R. I. & P. Ry. and St. L., K. C. & C. Ry.	124,469.14	111,178.60
K. C. So. Ry.	7,044.49	27,260.75
St. L. & H. Ry.	37,275.38	145.23
M. K. & T. Ry.	140,593.46	63,815.12
K. C. C. & S. Ry	14,654.57	10,846.91
C. B. & Q. R. R.	394,878.77	261,556.41
C. G. W. Ry.	49,459.47	34,621.62
Totals.	$1,465,269.52	$1,085.426.30

These figures are proven by the auditors of the different companies and either admitted, or not denied, by the state's expert to be correct as clearly appears from the cross examination of A. B. Taliaferro (Rec. 4581, 4582). It may, as to each company whose case was tried, be remarked that its figures, as thus found, were either expressly admitted to be correct or else not denied and taken to be correct. The purpose and intention of the legislation of 1907 was evidently to slightly increase the freight rates over the maximum allowed by the enjoined act of 1905, and simultaneously reduce the passenger rates so that the people would, as a result of *all* legislation, receive a substantial reduction in railroad transportation charges. So each of the supplemental and amended bills averred. The proofs of the railroads sustained the averments; those of the state did not controvert them.

(c) *All the acts took effect at the same time and as a whole, caused great loss.*

The admitted allegations of each bill are that these acts all took effect June 14, 1907, and such is the provision (Art. 4, Sec. 36) of the state constitution. So, for illustration, it may be ob-

served that the actual loss of the C. B. & Q. in state freight, not estimating the loss on stone and fruits, was, under the act of 1907, $58,588.36 less than the loss under the act of 1905, yet the reduction of the state passenger earnings overcame this slight gain, the net loss upon the two items aggregating $507,402.48. These figures do not include the losses in the interstate earnings which had to be reduced to meet the state rate (Finding 3, Rec., 5306, 5307). The interstate passenger annual loss (Finding 14, Rec., 5313) upon that road was $261,556.41, and interstate freight (Rec., 4746, 5098, Exhibit 101) $477,647.79 under the act of 1907, and $700,487.29 (Rec., 4746, 5098) under that of 1905. The losses to the other roads, both in the state passenger (Rec., 5313, Finding 14) and freight (Rec., 5318-5326) business was great, in some instances greater in proportion than those of the C. B. & Q. The gross annual state earnings of the latter were (Finding 17, Rec., 5315, 5316) in 1907, freight $1,580,529.64, miscellaneous freight $161,579.41, passenger $1,611,702.92, miscellaneous $731,021.89, or an aggregate of $4,084,833.06. The annual loss on state freight and passenger carriage of $507,402.48 was in a sum equal to more than twelve per cent of the gross state revenue, and about fifteen per cent of the gross state carriage revenue. In the St. L. & S. F. case it equaled per year over 30 per cent. In the other cases the losses ranged between these percentages. The gross annual state freight and passenger earnings of each road whose case was tried, together with the total diminution in state freight and passenger earnings caused by the laws of 1907, and percentage thereof, can be easily compiled from the findings of fact 14 (Rec., 5313), 17 (Rec., 5315) and 19 (Rec., 5318-5326.) From the figures therein set forth, it will be observed the percentages of losses of each road ranged from 15 to 30 per cent; that is to say, the actual reduction in state revenue by the two laws ranges in percentage between those figures. This is irrespective of the reduction in interstate business, which necessarily ensued.

8. AMENDED AND SUPPLEMENTAL BILLS TO ENJOIN THE RATES FIXED BY THE ACTS OF 1907, AND EFFORTS TO AVOID THE JURISDICTION OF THE UNITED STATES COURT.

(a) *Each act upon its face showed an attempt to evade such jurisdiction.*

The freight act of 1907 upon its face (Laws Mo. 1907, p. 171; Amended Bill, Rec., 64-66, Appendix 3), imposed upon no one the special duty of enforcing its provisions, but made each violation the subject of a fixed fine of $5000. So the passenger act (Laws Mo. 1907, p. 170; Amended Bill, Rec., 69-70; Appendix 6) provided only for a fine of $100 to $300 for each offense, and was applicable to all agents. Failure to pay a fine under another provision of the law (Rev. Sts. Mo. 1899, sec. 2680) subjected the offender to imprisonment. It is current history that the attorney generals and railroad commissioners of the various states had been holding conventions to obtain concert of action in respect to state action. Upon the mistaken supposition that such was the result of *Fitts* v. *McGhee*, 172 U. S., 516, 43 L. Ed. 535, the position was assumed that if an act fixing a rate created a criminal penalty and did not in terms impose upon some one a duty to enforce it, then injunction would not lie, as the suit would be one against the state. This contention was in the teeth of *Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed. 819, and was subsequently here denied. (*Ex Parte* Young, 209 U. S., 123, 52 L. Ed., 714; *Hunter* v. *Wood*, 209 U. S., 205, 52 L. Ed. 747; *Prentis* v. *Atlantic Coast Line*, 211 U. S., 210, 53 L. Ed., 150; *Willcox* v. *Cons. Gas Co.*, 212 U. S., 519, 53 L. Ed., 382.) It is significant, however, that the then Attorney General of Missouri was here permitted to argue the proposition (*Ex Parte* Young, 209 U. S., 123, 134, 52 L. Ed. 714, 719) and obtained one postponement below to await the result of such argument

(Opinion, Rec., 5284, 5285, 161 Fed. Rep., 419, 425.) He submitted to the Governor, who transmitted it to the legislature (Appendix 9) a report in which he expressly advised so framing a new law as to prevent the jurisdiction of the federal courts. The court below held the effort futile. The proposition is no longer debatable. (*Ex Parte* Young, 209 U. S., 123, 52 L. Ed. 714.)

(b) *Filing of amended and supplemental bills.*

The acts of 1907 were to take effect June 14, 1907.

This was admitted in the C. B. & Q. case (Amended Bill, Rec. 63, 66, 69; Answers, Rec. 96-97, 103-104; Const. Mo. Art. 4, sec. 36), and in the other cases as a reference to the bills and answers therein will show. Accordingly, upon June 11, 1907, the complainant in each of the eighteen cases filed a motion for leave to file an amended and supplemental bill then presented to the court (Rec. 57, 58), giving on the same day, *as required by the court* (Rec., 57) before permitting its actual filing, notice (Rec. 60) to opposing counsel of the application. Thereupon, on June 13, 1907, the court of its own motion made an order in each case setting the application for argument, and restraining the enforcement of, or putting in force the new rates. Upon June 14, 1907, the state *obtained a continuance because of the absence* of the Attorney General, and the restraining order was continued in force (Opinion, Rec., 5268-5270; Order, Rec., 59). Upon June 17, 1907, after full argument is each case, an order (Rec., 5859-5861, Nos. 672, 673, pp. 63-66; Nos. 674, 675, pp. 62-65; Nos. 676, 677, pp. 57-60; Nos. 678, 679, pp. 60-63; Nos. 680, 681, pp. 60-63; Nos. 682, 683, pp. 55-57; Nos. 684, 685, pp. 53-55; Nos. 686, 687, pp. 89-91; Nos. 688, 689, pp. 87-90; Nos. 690, 691, pp. 91-93; Nos. 692, 693, pp. 63-66; Nos. 694, 695, pp 60-63; Nos. 696, 697, pp. 52-55; Nos. 698, 699, pp. 52-55; Nos. 700, 701, pp. 58-61; Nos. 702, 703, pp. 50-53; Nos. 704, 705, pp. 58-61) was

entered upon an opinion (Rec. 5270-5275; 155 Fed. Rep. 220) that the amended and supplemental bill be filed as of June 11, 1907, the day of its presentation, *that process should be issued thereon,* so the court could in the future decide whether it should be treated as an amended, supplemental, ancillary, dependent or original bill, granting, *by consent,* however (Opinion, Rec., 5330; Finding 6, Rec., 5308) a temporary injunction as to the freight rates, but denying, without prejudice, the application as to the passenger rate pending a future test based upon actual experience.

9. The Amended and Supplemental Bill.

The amended and supplemental bill (Rec. 61-73; Nos. 672, 673, p. 66; Nos. 674, 675, p. 66; Nos. 676, 677, p. 61; Nos. 678, 679, p. 64; Nos. 680, 681, p. 76; Nos. 682, 683, p. 58; Nos. 684, 685, p. 56; Nos. 686, 687, p. 92; Nos. 688, 689, p. 91; Nos. 690, 691, p. 94; Nos. 692, 693, p. 67; Nos. 694, 695, p. 63; Nos. 696, 697, p. 56; Nos. 698, 699, p. 55; Nos. 700, 701, p. 62; Nos. 702, 703, p. 54; Nos. 704, 705, p. 62;) in each case was filed as of June 11, 1907. Each bill was practically alike. No question arising as to its averments, no detailed statement of its contents is necessary. Process was issued thereon, and appearances duly entered in each case (Rec. 73, 74, 75; Nos. 672, 673, pp. 80, 86; Nos. 674, 675. pp. 78, 86; Nos. 676, 677, p. 73; Nos. 678, 679, pp. 76, 83; Nos. 680, 681, pp. 82; Nos. 682, 683, p. 77; Nos. 684, 685, pp. 68, 69; Nos. 686, 687, p. 112; Nos. 688, 689, p. 111; Nos. 690, 691, pp. 106, 114; Nos. 692, 693, p. 85; Nos. 694, 695, pp. 82; Nos. 696, 697, p. 74; Nos. 698, 699, p. 74; Nos. 700, 701, p. 80; Nos. 702, 703, p. 72; Nos. 704, 705, p. 74). Each bill averred the facts as to the previous litigation, and the passage of the acts of 1907, claiming the rates fixed therein to be confiscatory, unconstitutional and invalid upon the various grounds hereinafter discussed. The bills made as additional parties defendant H. R. Oglesby, who, since the filing of the original bill, had been elected to succeed

Joseph P. Rice, certain individuals as representatives of a class of passengers seeking to avail themselves of the two-cent rate, and county judges and treasurers upon whom, as officials, devolved (Mo. Const. Art. 11, sec. 8, Rev. Sts. Mo. 1899, secs, 9824, 9827) the duties of collecting, preserving and protecting, for the benefit of the school fund, all penalties for the violation of the various rate statutes, and in some instances, the prosecuting attorneys of the counties, who, under the law, might sue for the penalties. The theory as to making passengers and the county officials parties was the same as that adopted in making certain shippers parties to the original bill, i. e. in the excess of caution because of the then, but now exploded contention, that the suits were not maintainable against the state officers because the law, instead of imposing specific duties as to its enforcement, had been so framed that the state officers could proceed under their *general* duties to collect the penalties imposed. Each case having been dismissed as to these parties, and they having refused to appeal, there is now no question as to their rights subject to review. Moreover, it is now settled that the action can be maintained against the state officers (*Ex Parte* Young, 209 U. S. 123, 52 L. Ed. 714) even if not specifically charged with the performance of a duty under the law which is sought to be enjoined.

10. Unsuccessful Attempt to Evade the Jurisdiction of the Court below.

Upon June 14, 1907, the day the laws went into effect, and when a continuance was, by the state, obtained (Order, Rec., 59; Opinion, Rec., 5270-5275) *because of the absence* of the then Attorney General, the latter filed bills against each of the eighteen railway companies in the state courts in Kansas City and St. Louis for an injunction requiring them to put in force both the freight and passenger rates fixed by the acts of 1907, obtaining without notice

and causing to be served restraining orders to the same effect, so that the situation was created of the court below enjoining the enforcement of the rates, and the state courts commanding the railroads to put them in force. This was in line with the advice (Appendix 9) the then Attorney General gave as to so framing the laws of 1907 as to avoid jurisdiction in the federal courts. The action thus taken in the state courts was with full knowledge of all that had been previously done in the court below.

11. Amendment to Bills and Injunction against Proceeding in the State Courts.

Upon July 16, 1907, an amendment to each bill (Nos. 672, 673, p. 80; Nos. 674, 675, p. 80; Nos. 676, 677, p. 74; Nos. 678, 679, p. 77; Nos. 680, 681, p. 76; Nos. 682, 683, p. 71; Nos. 684, 685, p. 70; Nos. 686, 687, p. 105; Nos. 688, 689, p. 104; Nos. 690, 691, p. 108; Nos. 692, 693, p. 79; Nos. 694, 695, p. 76; Nos. 696, 697, p. 68; Nos. 698, 699, p. 68; Nos. 700, 701, p. 74; Nos. 702, 703, p. 66; Nos. 704, 705, p. 75) was filed reciting the facts as to the attempt to carry on the litigation in the state court, and asking an injunction against the prosecution of those cases. This was upon the theory that the court below had a prior jurisdiction, which it was bound to protect. (*Julian* v. *Central Trust Co.*, 193 U. S. 93, 48 L. Ed. 629; *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38, 52 L. Ed. 379; *Ex Parte Young*, 209 U. S. 123, 162, 163, 52 L. Ed. 714, 730.) This view was sustained (Opinions, Rec., 5268-5270; 5270-5275; 5275-5279; 155 Fed. Rep. 220; 161 Fed. Rep. 419) below, and subsequently met with the express and emphatic approval of the state court (*State ex rel. Missouri Pacific R. Co.* v. *Williams*, 221 Mo. 227), when, after final decrees below, a *nisi prius* state court at St. Louis at the instance of the state prosecutor, acting under the direction of the Governor, enjoined putting into force more than the two-cent passenger fare which had been decreed to be confiscatory. The su-

preme court of the state, by prohibition, promptly met the situation and set aside the injunctive order, holding that the federal court had a jurisdiction which should be respected and its decree could be reviewed upon appeal, but should not be thwarted and evaded. *After that only*, the appeal here in the C. B. & Q. case was first taken, subsequently followed by appeals in the remaining cases.

12. Demurrers, Answers and Replications.

A demurrer to each amended and supplemental bill and amendment thereto was filed by all defendants and overruled (Rec. 82-92, 95; Nos. 672, 673, pp. 87-97; Nos. 674, 675, pp. 86-96; Nos. 676, 677, pp. 81-89; Nos. 678, 679, pp. 84-93; Nos. 680, 681, pp. 84-94; Nos. 682, 683, pp. 79-87; Nos. 684, 685, pp. 77-86; Nos. 686, 687, pp. 113-120; Nos. 688, 689, pp. 111-114; Nos. 690, 691, pp. 116-126; Nos. 692, 693, pp. 90-96; Nos. 694, 695, pp. 84-93; Nos. 696, 697, pp. 76-86; Nos. 698, 699, pp. 79-85; Nos. 700, 701, pp. 85-91; Nos. 702, 703, pp. 78-85; Nos. 704, 705, pp. 82-91) upon an opinion (Rec. 5279-5285; 161 Fed. Rep. 419, 425) withheld for sometime at the request of the state to await the decision here of *Ex Parte* Young, 209 U. S. 123, 52 L. Ed. 714, in which its then Attorney General had presented the question that no state rate could be enjoined if the statute, instead of prescribing specific methods for its enforcement, merely made its violation criminal, the method he had previously advised the Governor and legislature to adopt to evade federal jurisdiction. Upon May 12, 1908, answers (Rec., 95-104; Nos. 672, 673. pp. 100-110; Nos. 674, 675, pp. 100-110; Nos. 676, 677, pp. 93-103; Nos. 678, 679, pp. 97-107; Nos. 680, 681, pp. 97-108; Nos. 682, 683, pp. 91-101; Nos. 684, 685, pp. 90-100; Nos. 686, 687, pp. 124-134; Nos. 688, 689, pp. 120-130; Nos. 690, 691, pp. 130-140;

Nos. 692, 693, pp. 100-110; Nos. 694, 695, pp. 97-107; Nos. 696, 697, pp. 89-99; Nos. 698, 699, pp. 88-98; Nos. 700, 701, pp. 96-106; Nos. 702, 703, pp. 88-98; Nos. 704, 705, pp. 95-105) were filed by the state officers and afterwards adopted (Rec. 213) by all the other defendants. Upon June 1, 1908, before they were due, replications were filed and the cases put at issue (Rec. 105, 106; Nos. 672, 673, pp. 109-110; Nos. 674, 675, pp. 109-110; Nos. 676, 677, pp. 102-103; Nos. 678, 679, pp. 106-107; Nos. 680, 681, pp. 107-108; Nos. 682, 683, pp. 100-101; Nos. 684, 685, pp. 99-100; Nos. 686, 687, pp. 133-134; Nos. 688, 689, pp. 129-130; Nos. 690, 691, pp. 139-140; Nos. 692, 693, pp. 109-110; Nos. 694, 695, pp. 106-107; Nos. 696, 697, pp. 98-99; Nos. 698, 699, pp. 97-98; Nos. 700, 701, pp. 104-105; Nos. 702, 703, pp. 97-98; Nos. 704, 705, pp. 104-105).

13. Order as to a Trial of All Cases, and Final Submission Thereon.

Upon June 8, 1908, complainants in ten of the cases served notice (Rec., 113) of a renewal of their application, to be made upon June 13, 1908, for temporary injunctions against the passenger rate. The defendants appeared and requested (Rec., 114) a ninety day postponement. *By consent of all parties,* it was then ordered (Rec., 114) that all of the eighteen pending cases be set for trial for final hearing upon October 5, 1908, before the court upon the testimony theretofore taken by the master in the C. B. & Q., Missouri Pacific and Wabash cases relative to the act of 1905, and such further evidence as might be adduced orally in open court. Upon October 5, 1908, *at the insistence of defendants* (Rec., 3750) the trial was (Rec., 117) postponed until November 9, 1908, but an order (Rec., 117) was entered that they be tried in their numerical order upon the docket, the court denying the request

(Rec., 3734-3750) and attempt of the state to try the C. B. & Q. case first. Thereafter, the evidence was all taken and transcribed and all the cases finally submitted (Rec., 171, 4781) upon December 30, 1908.

14. Findings of Fact.

The parties having by stipulation (Rec., 114, 115) dispensed with the master and *consented to a trial before the judge upon oral evidence,* the latter specially found all the facts (Finding, Rec., 5305-5327) as to which it may be observed:

(a) *State's counsel, although asked so to do, refused to submit any requests for special findings, or to point out below any errors or inaccuracies therein.*

"Prior to the argument, the court requested counsel on both sides to submit requests for findings of fact," but counsel for the state officers declined so to do (Rec., 5305). The railroads complied (Rec., 129-166) with the suggestions, formulating their theories in the form of requests for findings. Express leave was given to either party to make application within thirty days to correct any error or inaccuracy therein (Rec., 5315, 5327, Finding 17, 20). No such application was made. The periods, during which the earnings and expenses were actually found, were at the trial, by both parties agreed to and conceded to be representative (Rec., 5307, 5315; Findings 4, 17). Complainants in advance furnished statements to the state's experts (Rec., 5307, Finding 4) for the agreed test periods, the latter being given the fullest opportunity and *all the time desired* to examine every book and paper of complainants (id., Finding 5), and conceding (id., Finding 6), that the companies' books had been fairly, ac-

curately and honestly kept. The state's experts said (Ev. Taliaferro, Rec., 4495, 4557; Hamilton, Rec., 4635) that every courtesy was shown them and every opportunity and facility extended them to enable them to obtain the facts. The court below should not, therefore, be lightly put in error as to any findings of fact, no complaint on that score having been made until the appeal was taken, months after they were made, and not until an attempt to defeat the decree by the process of the state court had been held futile. (*State ex rel.* v. *Williams,* 221 Mo., 227.)

(b) *Findings made in all the cases.*

The findings of fact (Rec., 5305-5327) are specific and made in great detail, applying to all the cases. They are needlessly reprinted in the records of cases Nos. 672-705 inclusive. Any effort to summarize them would be an injustice to both parties. They will, immediately following this statement, be printed in full.

For the purposes of this statement it is sufficient *now* to say that the court found:

(1) Practically all the railroad business of the state was, as original or connecting carriers, done by the eighteen complainants (Finding 1, Rec., 5305). Such business, both state and interstate, could only be done by the same property, trains, employes and facilities (Finding 2, Rec., 5305). By reason of geographical, railroad and business conditions, any state rate necessarily fixed the interstate rate, so that a reduction in a state rate necessarily caused a like proportionate reduction in the interstate, and the short line between any two points necessarily made the rate (Finding 3, Rec., 5306).

(2) The *periods* adopted by the court were fair, *actually agreed to and approved by the parties,* as fairly representative, (Findings 4, 17, Rec., 5307, 5315). They were the actual periods

adopted by both parties, in the statements, as fairly representative and submitted as the theories, respectively, of the two sides to the cases (id.)

(3) The actual minimum value of each road's property in Missouri, was found (Finding 11, Rec., 5311, 5312) in a sum equaling the valuation estimated by the state assessing officers in their assessments for taxation. In all instances this was nearly equal to or less than the bonded indebtedness, and in all cases less than the outstanding bonds and stock upon which dividends were paid. The part thereof devoted to the use of any substantial class of state traffic was such proportion of the total valuation as the revenue from that class bore to entire revenue in the state from all classes of business (Finding 16, Rec., 5315), the percentages being specifically (Finding 17, Rec., 5315-5316) found. This is known as the state assignable value. Upon this each complainant was entitled to an annual return equal, at least, to six per cent. (Finding 12, Rec., 5312).

(4) The earnings from all and the different classes of business were fixed, certain and exactly ascertainable (Finding 6, Rec., 5308). So were the entire expenses incurred in the state (id.). The only difficulty was in dividing the expenses of any class of business as between state and interstate, as it was incurred in a common indivisible operation (id.). An apportionment of expenses upon the basis of state and interstate revenue from any class of business in these cases, brought, with the extra cost found as to state business, a result that fairly and justly represented the expense thereof (Finding 6, Rec., 5308-5309).

(5) It actually cost fifty per cent more to do the state freight business, and twenty-five per cent, more to do the state passenger business than the interstate. This should be added to state expenses after their ascertainment upon the revenue basis (Findings 7, 8, 19, Rec., 5310, 5324).

(6) There should as part of such expenses be also deducted from the state freight earnings a sum equaling the diminution there would have been had the enjoined state rates been put in force (Findings 8, 16, 19, Rec., 5310, 5314, 5315, 5319, 5327).

(7) Without any allowance for the extra cost of doing the state over interstate business, the amount actually received from the state passenger business after deducting the expense of doing business upon the basis of the state and interstate expense being equal, was, as to each road, less than 6 per cent; as to four of the eighteen roads, nothing; from the state freight business three of the roads only received a slight excess over 6 per cent upon the minimum assignable value, and only one of them as much as 6 per cent upon the combined state freight and passenger business (Finding 19, Rec., 5319-5327).

(8) When the state earnings were ascertained and the deductions aforesaid for extra cost made, there was not a six per cent return upon the assignable state value of the property of any company devoted to the use of any class of business (Finding 19, Rec., 5318, 5326). The only companies which received *any* return were the St. L. & S. F. (Cases Nos. 672-3) which received 2.29% upon its state freight and 1.16% upon its state passenger business, the M. K. & T. (Cases Nos. 680-1) which received .72% upon its state passenger business, and the K. C. C. & S. (Cases Nos. 682-3) which received 1.36% upon its state freight business.

15. Opinion Below.

Judge Smith McPherson, who tried the case below, delivered an elaborate opinion (Rec., 5275-5304, 168 Fed. Rep., 317, unnecessarily reprinted in the records of cases Nos. 672-705), holding that:

(a) Injunction would lie to prevent the enforcement of confiscatory state rates (Rec., 5286-5288; 168 Fed. Rep. 317, 339, 340).

(b) The state laws, not purporting upon their face to apply to interstate rates, are not invalid because they as a matter of fact directly affect and cause to be reduced all interstate rates within the state (Rec., 5288-5292; 168 Fed. Rep. 317, 340-344).

(c) The penalty clauses of the state statutes were not void because they did not specifically provide for imprisonment (Rec., 5292-5293; 168 Fed. Rep. 317, 345, 346).

(d) The fact that the statutes applied to all the roads, yet fixed rates confessedly confiscatory as to two of them, the St. L. & H. and K. C. C. & S., did not affect their validity as to any other complainant (Rec., 5293-5296; 168 Fed. Rep. 317, 346-348).

(e) Expenses of any class of business as between state and interstate should be first divided in the proportion of the revenue from the class (Rec., 5296-5302; 168 Fed. Rep. 317, 348-352) and in addition thereto, allowance should be made for the extra cost of doing any class of the state business over the state (id.) by deducting same from the earnings of that class because this when done in these cases brought a fair and just result.

(f) The rates were confiscatory if the net result thus ascertained did not bring to complainant a return at least equaling six per cent per annum of the value of the portion of the property devoted to the state use (Rec., 5301-5303; 168 Fed. Rep., 317, 354)

(g) While a court could not fix rates, yet if it could do so, it would fix a passenger rate of two and one-half cents for the stronger and three cents for the weaker roads (Rec., 5303-5304; 168 Fed. Rep. 317, 356).

16. Final Decree of March 8, 1909.

Upon the findings (Rec., 5305-5327) and opinion (Rec., 5285-5304), a final decree was in each case entered (Rec., 5241-5243; *infra* par. 20) to the effect: (a) The state rates so fixed by the acts of 1905 and 1907 were confiscatory and should not be enforced against complainant; (b) the Attorney General, Railroad Commissioners and other officials should not enforce against complainant the penalties provided for a violation of said acts; but if in the future circumstances should so change that the rates fixed should be compensatory, then such further orders would be made as would be just and proper in accordance with the precedent set in the Nebraska case (*Smyth* v. *Ames,* 169 U. S., 469, 42 L. Ed., 819, 850); (c) the shippers and passengers, defended by the Attorney General, should be dismissed without prejudice, with leave to complainant to bring them in by supplemental bill if they should attempt to enforce such statutes; and (d) the costs should be divided, equally between the railroad and state officers.

17. Complainants' Motion to Modify.

Complainants in each case filed a motion (Rec., 5244; *infra* par. 20) afterwards amended (Rec., 5245-5246; *infra* par. 20) to modify the opinion and decree by (a) changing the view upholding the penalty clause; (b) striking from the opinion the statement that the court would, if it could, fix the passenger rates upon some of the roads at two and a half cents per mile; (c) changing the decree so far as it taxed costs against complainant, and (d) modifying the decree as to shippers and passengers.

18. SUPPLEMENTAL OPINION.

In a supplemental opinion (Rec., 5327-5330; 168 Fed. Rep., 317, 356) in each case (*infra* par. 20) the court adhered to its ruling as to costs and the statement as to the passenger rate which the court would make if legislating, but held to be void the penalty clauses in the acts of 1907. It also modified its views to this extent: Since the Attorney General *had actually agreed to a temporary injunction against the freight rates* and had obtained the aid of the court in keeping in force for nearly two years the passenger rate, it was only fair to so frame the decree that the court could in the future enforce the same against efforts to evade or thwart it, a view with which the state court expressed itself as being in accord (*State ex rel.* v. *Williams*, 221 Mo., 227) when afterwards the evasion was attempted.

19. AMENDED FINAL DECREE.

Thereupon an amended final decree was in each case (Rec., 5246-5249; *infra* par. 20) at the same term, and upon April 17, 1909, entered, changing the former one to the extent that: (a) The dismissal as to shippers and passengers was, as to the injunctive relief only, leaving them bound so far as concerned the establishment of the fact that the rates were confiscatory; as these parties expressly declined to appeal (Rec., 5249-5255) no question can arise as to this modification; (b) modifying the order (Rec., 61) obtained by the state upon June 17, 1907, compelling the putting and keeping in effect until further order, the two cent fare, providing that complainant could be restored to the *status quo* and under the direction and subject to future orders put into effect

the rates which the former statutes authorized and which the court had ordered taken out. As to these modifications no complaint is made in any assignment of error (Rec., 5257-5264; *infra*, par. 20),

20. Like Action in all the Cases.

Final decrees, motions to modify and amended formal decrees, differing only in the names of the parties, were entered in all the cases, (Nos. 672, 673, pp. 204-212; Nos. 674, 675, pp. 207-215; Nos. 676, 677, pp. 194-201; Nos. 678, 679, pp. 204-212; Nos. 680, 681, pp. 203-211; Nos. 682, 683, pp. 196-204; Nos. 684, 685, pp. 191-199; Nos. 686, 687, pp. 229-238; Nos. 688, 689, pp. 221-229; Nos. 690, 691, pp. 235-243; Nos. 692, 693, pp. 201-208; Nos. 694, 695, pp. 197-205; Nos. 696, 697, pp. 191-199; Nos. 698, 699, pp. 191-199; Nos. 700, 701, pp. 202-207; Nos. 702, 703, pp. 188-196; Nos. 704, 705, pp. 195-203).

21. Appeals.

The defendants, other than the attorney general and railroad commissioners, expressly declined to appeal. These officers, however, in the manner and at the times herein stated, appealed all the cases, first attempting to bring here that of the C. B. & Q. only, leaving the decrees in the other seventeen cases in full force and effect. The petitions for appeal and assignment of errors in each case are joint, not several, so that any error to exist must be joint, not several (Appeal papers, Rec., 5255, 5257-5264; Nos. 672, 673, pp. 213-229; Nos. 674, 675, pp. 216, 231; Nos. 676, 677, pp. 202-214; Nos. 678, 679, pp. 213-228; Nos. 680, 681, pp. 212-228; Nos. 682, 683, pp. 205-219; Nos. 684, 685, pp. 200-212; Nos. 686, 687, pp. 239-255; Nos. 688, 689, pp. 230-244; Nos. 690, 691, pp.

244-261; Nos. 692, 693, pp. 209-227; Nos. 694, 695, pp. 206-220; Nos. 696, 697, pp. 200-216; Nos. 698, 699, pp. 200-212; Nos. 700, 701, pp. 211-228; Nos. 702, 703, pp. 197-210; Nos. 704, 705, pp. 204-216.)

22. Assignments of Errors.

Thirty-two errors are assigned by the state in each of its appeals (Rec. 5257-5264; Nos. 672, 673, p. 218; Nos. 674, 675, p. 220; Nos. 676, 677, p. 204; Nos. 678, 679, p. 217; Nos. 680, 681, p. 217; Nos. 682, 683, p. 209; Nos. 684, 685, p. 201; Nos. 686, 687, p. 244; Nos. 688, 689, p. 234; Nos. 690, 691, p. 250; Nos. 692, 693, p. 216; Nos. 694, 695, p. 210; Nos. 696, 697, p. 206; Nos. 698, 699, p. 202; Nos. 700, 701, p. 217; Nos. 702, 703, p. 200; Nos. 704, 705, p. 206).

The claim therein is that the court below erred:

(a) In decreeing to be confiscatory the rates in question, and enjoining their enforcement (Assignments 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11) thus attempting to present the questions only whether the findings of facts justified the decree or whether there was any evidence to support it, without pointing out wherein there was any lack thereof.

(b) In enjoining the commissioners from enforcing the passenger rates (Assignment 12), a question never suggested until the assignment was filed, and one not joint and common to all appellants.

(c) In permitting to be filed the amended and supplemental bill and overruling the demurrers thereto (Assignments 13, 14, 15, 16, 17) because the facts averred were not proper by way of supplement.

(d) In enjoining the present Attorney General from prosecuting in the state court suits instituted by his predecessor (Assignment 18), although the decree (Rec., 5247) does not mention any state court suit, and with his consent he was substituted for his predecessor, adopting his pleadings (Rec., 174).

(e) In finding that expenses, as between state and interstate business, should be divided in the proportion of revenue (Assignments 20, 21, 22, 24).

(f) In finding that it costs fifty per cent more to do the state freight, and twenty-five per cent more to do the state passenger business than to do the interstate (Assignments 19, 23, 25).

(g) In adopting in its findings the tables of earnings and expenses (Assignment 26) and stating therein that it was conceded that the railroads actually and honestly kept their books (Assignment 28).

(h) In finding, *in the opinion*, that a large number of men were discharged because of a reduction in rates (Assignment, 29), a fact not recited in the findings, and therefore not the subject of an assignment.

(i) In finding that the short line between two points necessarily fixed the rates (Assignment, 27).

(j) In not excluding from the valuation found, the value of the franchise (Assignments, 30, 31, 32), something (Rec., 5311, Finding 11) not included therein.

The errors thus assigned were never presented within the thirty days fixed by the court (Rec., 5315, 5327, Findings, 7, 20) to call attention to any error, mistake or inaccuracy in its findings, but were filed (Rec., 5257) after the expiration of the term, i. e., on July 28, 1909, in the C. B. & Q. case, and in the other cases (*supra* 21) in March, 1911, and after the failure to obtain the aid of the state courts (*State ex rel.* v. *Williams*, 221 Mo., 227), to evade the decree.

23. Cross Appeals:

(a) The railroads at the times hereinafter stated, took cross appeals in all the cases, assigning as error that the court should not have taxed any costs to them, and that the statutes were void for reasons other than that the rates were confiscatory. (Cross Appeal Papers, Rec., 5334-5336; Nos. 672, 673, pp. 230-234; Nos. 674, 675, pp. 232-236; Nos. 676, 677, pp. 215-219; Nos. 678, 679, pp. 229-233; Nos. 680, 681, pp. 229-233; Nos. 682, 683, pp. 221-224; Nos. 684, 685, pp. 213-216; Nos. 686, 687, pp. 256-260; Nos. 688, 689, pp. 245-249; Nos. 690, 691, pp. 262-266; Nos. 692, 693, pp. 228-232; Nos. 694, 695, pp. 221-225; Nos. 696, 697, pp. 219-221; Nos. 698, 699, pp. 213-217; Nos. 700, 701, pp. 229-232; Nos. 702, 703, pp. 211-215; Nos. 704, 705, pp. 217-221.)

(b) The cross appeals were taken as a matter of precaution, and because the questions are of a character which should be here determined. The court below entered its decree upon the sole ground that the rates were confiscatory. Of course this court can affirm, even if wrong reasons are given for a right result. The court below, however, reserved the power to dissolve the injunction if in the future changed conditions made the rates appear to be reasonable. It was, therefore, thought possible that the question of the validity of the statutes in other respects might not be considered in the absence of a cross appeal. To avoid such a contingency one was taken in each case.

24. Evidence in the Case and Result Thereof.

Some of the assignments of error in general terms challenge the sufficiency of the evidence to sustain the findings. It is almost an endless task to separate that portion thereof which relates only

to the cases under consideration and the assignments of error are so general that it is difficult to understand wherein it is claimed that the findings are so unsupported. However, there will be now made some observations upon and a general summary of some of the evidence sufficient without further investigation to overwhelmingly sustain the findings.

(1) *The method of preparing the transcript in the futile endeavor to first hear the C. B. & Q. case is confusing and needs explanation.*

(a) The first evidence appearing in the record is that taken upon the reference to a master, which reference was abandoned by stipulation (Rec., 114, 115), upon issues framed under the freight rate law of 1905, since repealed, whereas the parties agreed upon representative and test periods during the operation of the laws of 1907, upon which the cases were finally submitted. This evidence consists of 3402 pages (Rec., 229-3685). Of this, 1235 pages (Rec., 229-1464) were in the case of the C. B. & Q. *Railway* Company, a *lessee,* which, because the lease to it (Rec., 114, 115) was canceled, went out of the case as a party; 2220 pages were taken in the Nos. 686-7, Missouri Pacific (Rec., 1464-2582) and Nos. 694-5, the Wabash cases (Rec., 2583-3685), neither of which was finally tried. This evidence in these three cases was offered *in lump* and as a whole (Rec., 4637), though no part of it has any bearing except that portion which consists of the opinion of experts. Reference to that part of such evidence, so far as it bears upon any question here presented, will hereafter be made at the appropriate place.

(b) That portion of the evidence so taken in the C. B. & Q. *lessee* case before the master was made upon the former hearing here, contrary to the position assumed at the final hearing below, the basis of attack upon the figures submitted in the *final* trial

of the C. B. & Q. R. Co., *lessor*, against the rates fixed by the laws of 1907. Below a representative test period was actually agreed upon and the state's expert agreed with the railroad's auditor upon the figures then presented. More will be hereafter said upon this subject. This much has, however, been written as a caution against the confusion attendant upon the futile method heretofore adopted to prepare a record here for a disposition of the C. B. & Q. case (Nos. 130, 134) before all the cases tried could be presented, thus rendering unintelligible the tremendous record presented.

(2) *Trial below upon oral evidence.*

(a) The final trial below was *by consent* (Rec., 114) upon oral evidence (Rec., 3767-4782) offered by and against each company in the order in which their cases appeared upon the docket. There was *during the course* of that trial, while taking the evidence in Nos. 672-3, the St. L. & S. F. case, offered (Rec., 4637) *in lump* all the evidence taken in the *abandoned* reference to the master in the cases under the *repealed* law of 1905, consisting of that of the C. B. & Q. *lessee* company (Nos. 130, 134), not now a party to the cause, and that of the Missouri Pacific (Nos. 686-687), and the Wabash (Nos. 694-5) cases, neither of which three cases was finally tried below. In each case *actually* tried, carefully prepared exhibits for the *test* periods agreed upon, as to the laws of 1907, were produced by each company and the state. The figures of the railroads were conceded to be correct, the only contention of the state being as to the theory adopted for the division of expenses. (Opinion, Rec., 5300, 5301; Finding 14, Rec., 5311).

(b) If the evidence as a whole is to be read, no *intelligent* idea can be obtained thereof except by beginning with the final trial (Rec., 3767) below and considering that evidence in the order in which it was offered. Hence this protest.

(3) *Theories presented by each party.*

It is important, before considering the evidence offered, to understand the theories presented by the parties to the litigation.

(a) When the evidence was taken before the master under the repealed act of 1905 in the abandoned Missouri Pacific (Nos. 686-7), Wabash (Nos. 694-5) and C. B. & Q. *lessee* (Nos. 130, 134) cases, the state had no definite theory, but examined and cross-examined witnesses in such a loose and haphazard manner as to throw little, if any, light upon the controversy as it finally developed. One reading this evidence first and as a whole would find himself lost. At the *final* trial against the rates fixed by the acts of 1907 both sides had definite fixed theories; there was no compromise, no half-way place between them. The true figures upon each theory were prepared and agreed to by two experts upon each side, they having been for the purpose appointed by the court *by agreement* of the parties (Rec., 174). These figures were adopted as correct upon each theory presented, the trial judge (Finding 14, Rec., 5312) saying, "each of said nine statements is found to be correct upon the respective theories presented." The figures thus presented appear (Rec., 175-212) in detail so that if any particular theory be adopted the material for the final decrees is at hand. To fully understand the evidence these theories should be first outlined.

(b) Both parties agreed that all the earnings and all the expenses from all the property in the state were actually and correctly presented by the statements of the auditors of the railroads. Both also agreed that the question of confiscation was to be ascertained in this way:

Find the value of the whole railroad property in the state. Take, as an assignable value, such proportion thereof as will fairly represent the part thereof devoted to the actual use of any par-

ticular class of business. Upon such value calculate six per cent annual interest and there is thus ascertained the return to which, at least, any railroad is entitled. There is next to be ascertained the state earnings from that class of business, the rates of which are in question. This ascertained, there is to be deducted therefrom the expense of doing that business. If this is less than a sum, at least, equaling six per cent annual interest upon the assignable value, then there is confiscation, otherwise not.

(c) The theories of the railroad companies were outlined in requests (Rec., 129-167) for findings which went more into detail with figures than was done either by the court in its special findings or by the four experts in their combined statements. The final results were, however, in each instance the same.

These theories were that the question of confiscation was to be thus determined: The entire value of all the railroad property in the state should be ascertained. There should be set aside as the state assignable value of any particular class of state business, and as the value devoted to that use, such percentage of the entire value in the state, as the earnings from that particular class bore to the entire earnings of all kinds in the state. Upon this there should be calculated interest, at least of 6 per cent per annum. The result would represent the amount that the company was entitled to earn upon that class of business. To illustrate: If it be assumed that the total value of an entire railroad property in the state were $10,000,000, and the earnings from state freight and state passenger each ten per cent of all the earnings therein, then the state freight and passenger assignable value would be ten per cent each, or $1,000,000, upon which the company would be entitled to earn, at least 6 per cent interest, or $60,000 per year, or upon both, $120,000. So far as the net income from these classes of traffic fell short of that result, so far would the rates be confiscatory. The state did not below differ from this theory.

The gross earnings from the same class of the state business should be next ascertained. There should be deducted therefrom the expense of doing that business. From the result thus ascertained there should be also deducted in the case of state freight (the rate as to which had been enjoined) the diminution in earnings, which would have existed had the enjoined rate been in force. If the net result did not equal at least 6 per cent annual interest upon the assignable value, ascertained as aforesaid, there was confiscation. To this the state below agreed.

The total expenses of all the passenger fare or freight carriage business in the state, and of every other class, state and interstate, were matters of certainty and agreed to by both sides. The chief difference below between them (Findings 14, 15, Rec., 5312-5314; Opinion, Rec., 5300-5301) was how to divide such expenses as between state and interstate business. The railroads divided the expenses in this way: There was first ascertained the percentage the state revenue from each class was to the entire revenue of that general class in the state from all sources. This was then deducted from the state earnings of that class as the first or equal expense, i. e., treating state and interstate expense on the basis of equal cost. From the sum thus ascertained, and in addition to the first expense thus deducted, there was next deducted such further sum as represented the extra cost, if any, of doing that class of state business over and above that of the interstate. Then in case of state freight there was also deducted the diminution in earnings which would have existed had the enjoined rates been put in force; this last deduction being conceded by the state. The sum thus left represented the net earnings. If they did not equal 6 per cent annual interest upon the assignable value, then the rate was confiscatory. To again illustrate: Assume, as before, the total value in the state to be $10,000,000, of which the assignable value is 10 per cent each, or $1,000,000 for state freight and state passenger business respectively. Then assume that the total earnings

in the state are $1,500,000, of which $750,000 is from freight and a like amount from passenger business, $150,000, or 20 per cent of each being for state business. Assume, then, that the total freight and passenger expenses are each 65 per cent of the earnings or $487,500. There should be assigned to state freight and passenger business each 20 per cent, or $95,500, because the state freight and passenger revenue is in each instance one-fifth, or 20 per cent of the whole of that class. This would make the expense of each $95,500. Deducting this from the earnings, $150,000, would leave net $54,-500, instead of $60,000 to which each class of business was entitled. But there should also be made such further deductions as equal the diminution in state freight had the enjoined rates been put in force and the extra cost of doing the state business.

(d) The state's theory as to assignable value does not differ from that of the railroads. Before the master upon the *abandoned* reference as to the *repealed* act of 1905, the contention was by the state's then chief expert (Ev. Ludlam, Rec., 2026) that it should be determined upon the basis of revenue. Upon the final trial, a general statement was made by A. B. Taliaferro, the assistant to Mr. Ludlam, who, at the time of the final trial, had succeeded to the position of chief expert that (Ex., 65; Rec., 4988-4989) it should be upon the basis of use. When the statements of this expert Taliaferro were presented as to each road (Exhibits 60, 64, 76, 77, 78, 79, 85, 86, 91, 92, 103, 104, 108, 109; Rec., 4981-4986, 5023, 5038-5040, 5056-5058, 5077, 5080, 5099-5103, 5115-5118) the division was actually made upon the basis of revenue. So also he finally testified (Rec., 4546, 4577, 4578, 4673). Such also was the method adopted (Rec., 175-212) by the four experts appointed *by consent* (R., 174) to make up statements upon the respective theories of both sides. Suffice it then to say that the parties, *at the trial*, agreed as to the method of ascertaining the assignable value.

(e) Upon the hearing of the *abandoned* reference, the state questioned the method of dividing as between state and interstate business, the miscellaneous freight earnings. The amount thereof not being sufficient to change the results, and to avoid any needless controversy, the railroads in the statements delivered to the state for examination, did not make this division. At the final trial, while offering its evidence, the state for the *first* time suggested a division of all miscellaneous earnings such as switching, storage, mail and express as between state and interstate earnings on the basis of revenue as earned in the carriage service. It then made that division upon the arbitrary basis of earnings for *carriage* service eliminating the division of earnings and expenses of miscellaneous business, as between state and interstate. The result is that both sides account for all earnings and all expenses. The state's figures have, however, added to state earnings those from such miscellaneous sources, divided as suggested. There is deducted therefrom the expenses ascertained upon a ton and passenger mile basis, though neither ton miles nor passenger miles have any relation to such miscellaneous earnings. The railroad *state* earnings were confined to those from carriage, to which the contested rates related. The court specially found (Finding 15, Rec., 5313, 5314) that the state's division of miscellaneous earnings was unfair to the railroads. However, with such division, if it had been outlined as correctly put in request 22 (Rec., 156-162) the result of the figures in relation thereto could not have changed the final result. A detailed statement of such divisions on the St. L. & S. F. R. Co. case (Nos. 672-3) for 3, 6, and 12 months respectively, were offered and proven by H. W. Press (Rec., 5639-5640) and appear as exhibits 70, 71, 72 (Rec., 5004, 5009, 5014). As to the C. B. & Q. case (Nos. 130, 134), the same problem was worked out by state expert Taliaferro (Rec., 4769, 4770) and appears as exhibit 105 (Rec., 5105). So Frank Nay (Rec., 4742-4743) made a

division (Exhibits 96, 97; Rec., 5090) of the miscellaneous revenue divided as between state and interstate business. The fact is that to divide the miscellaneous earnings as done by the state gives an undue advantage to it. The result, however, is not changed.

(f) The state divided freight expenses as between state and interstate upon the basis of the ton mile percentage, which being about one-half of the revenue percentage, reduced the state freight expenses about one-half. It divided the passenger expenses upon the passenger mile percentage, which was slightly in excess of the revenue. But as the freight expense was in each instance more than twice as much as the passenger, the difference between the parties was necessarily radical and far reaching. It is the only difference in the cases that could possibly affect the result. So the state conceded that it cost from 30% to 50% more upon a ton mile basis, to do the state than the interstate freight business. It then contended that it cost from 10% to 20%, less, passenger mile basis, to do the state than the interstate passenger business, otherwise its own figures showed a loss as to this business. Hence, it added to state freight expenses such 30% to 50% extra cost upon a ton mile basis and deducted 10% to 20% upon a passenger mile basis of the state passenger expenses. After making the deductions from earnings of all expense thus found upon the ton mile and passenger mile basis, and then deducting and adding the extra cost, a loss upon the *combined* assignable value, was figured out by *adding* the net earnings from *all* state freight and *all* state passenger business and deducting the same from a sum equaling six per cent interest upon that *combined* assignable value. In no other way could a loss be ascertained.

(4) *Figures produced by the railroads were correct and if their theories were right the rates were confiscatory.*

(a) The theories of the railroads were not only proven by experts but testified to by the railroad auditors, who, from their

records, before trial, prepared written statements which were for the representative and agreed test periods. These were delivered to the state's experts, who checked the same (or declined to avail themselves of the opportunity as to some of the small roads) with the railroad books and records and conceded them to be correct if the theories were right. By consent of parties (Rec., 174) two experts from each side were, at the close of the trial, selected by the court, who agreed to and reported (Rec., 175-212) to be correct the figures thus returned by the auditors, and applied them to the respective theories of both sides. The evidence of the railroad auditors, the numbers of the exhibits containing the statements submitted and checked by the state, and the evidence of the then state's chief expert Taliaferro admitting the correctness of the figures, can be readily found in the record. This was true in cases Nos. 672-3, St. L. & S. F., and Auditor Douglass (Rec., 4767, 4178-4194, 4635-4638, 4644) and H. W. Press (Rec., 4478-4480, 4638, Exhibit 2, Rec., 4790) so testified. The figures were conceded by state expert Taliaferro (Rec., 4556-4598). So in case Nos. 674-5, A. T. & S. F., Auditor Conrad (Rec., 4448-4456) and statistician Peabody (Rec., 4404-4448, Exhibit 45, Rec., 4937) so testified and the figures were conceded by Taliaferro (Rec., 4671-4673). In case Nos. 678-681, C. R. I. & P., Auditor Nay (Rec., 4687-4696, Exhibit 78, Rec., 5026) so testified and Taliaferro (Rec., 4697) so conceded. In case Nos. 682-683, K. C. S., Auditor McCarty (Rec., 4698-4704, Exhibit 82, Rec., 5043) so testified to the figures, which were admitted to be correct by Taliaferro (Rec., 4705-4706). In case Nos. 684-5, St. L. & H., Auditor Worland (Rec., 4707-4712, Exhibit 87, Rec., 5060) so testified and his testimony was not only not denied by Taliaferro (Rec., 4712), but in the joint report of the experts (Rec., 195-196), of whom Taliaferro was one, the rates as to that road were admitted to be confiscatory. In case Nos. 690-1, M. K. & T., Auditor Seelig (Rec., 4713-4722, Exhibit 89, Rec., 5065) so testified. His statements were not

denied by Taliaferro (Rec., 4722) who, in his own statement (Exhibit 91, Rec., 5077, 5080), used the figures so produced by Seelig. In case Nos. 698-9, K. C. C. & S., Auditor Smith (Rec., 4725-4742, Exhibits 93, 93a, Rec., 5080-5082) so testified. His figures were not only not denied (Rec., 4742), but they were used in the joint report (Rec., 206-207) of the experts, of whom Taliaferro was one, and the rates were, as to that railroad, conceded to be confiscatory. In case Nos. 130, 134, C. B. & Q., Auditor Sturgis (Rec., 4743-4763, 4773-4, Exhibit 98, Rec., 5090) testified, and his figures were admitted by Taliaferro (Rec., 4767-4773, 4774-5) to be correct. In case Nos. 700-701, C. G. W., Auditor Ernst (Rec., 4776-4779, Exhibit 106, Rec., 5106) so testified and his testimony was not denied by Taliaferro, but his figures were (Rec., 4779-4780; Exhibit 109, Rec., 5115) used by the latter.

(b) The state's theories as to the acts of 1907 took as correct the figures of the railroad auditors and outlined them in the statements thus offered through their chief expert Mr. Taliaferro, as to each company: St. L. & S. F. case (Nos. 672-3) Exhibits 64, 72 (Rec., 4986, 5014); A. T. & S. F. (Nos. 674-5) Exhibits 76, 78 (Rec., 5020, 5026); C. R. I. & P. (Nos. 678-681) Exhibits 80, 81 (Rec., 5038, 5041); K. C. So. (Nos. 682-3), Exhibits 85, 86 (Rec., 5056, 5058); M. K. & T. (Nos. 690-1), Exhibits 90, 91 (Rec., 5077, 5080); C. B. & Q. (Nos. 130, 134), Exhibits 103, 104 (Rec., 5101, 5103), and C. G. W. (Nos. 700-1), Exhibits 108, 109 (Rec., 5115). The four experts, two chosen from each side *under a consent order* (Rec., 174) agreed upon the correct figures (Rec., 175-212) if these theories were adopted. They can, therefore, be readily followed. Suffice it to say, Expert Taliaferro (Rec., 4554-4598; 4767-4773) said he adopted as correct in each instance the figures contained in the statements of the railroads. So the court below specially found (Finding 6, 14; Rec., 5308, 5309, 5311-5312). In the opinion (Rec., 5301) the court below said:

"Here experts representing the different sides agree to *everything* pertaining to the accounting, the differences arising as to the basis."

Again (Opinion, Rec., 5300-5301) the court below said of the experts on both sides differing:

"The four accountants, Mr. Peabody and Mr. Johnson representing the railway companies, and Mr. Taliaferro and Mr. Hamilton representing the state, impressed me after hearing them testify and being in consultation with them for ten days after the cases were submitted, that the sole purpose of their work was to exhibit the truth, differing only as to extra cost, and that difference of extra cost largely confined to the local passenger traffic, and differing as to the theory as to how the expenses between local and interstate traffic within the state should be divided. Aside from those two questions there is not the slightest variance between the testimony of the experts upon the two sides."

(c) The real question to be considered being then solely as to the correctness of theories, renders unnecessary an extended review of those portions of the evidence throwing no light upon these differences. Especially is this true as to the vast volumes thereof offered under the abandoned reference and pertaining alone to rates under the repealed law.

(5) *There were below agreed periods which were to be taken as representative for the purpose of ascertaining whether the rates were confiscatory.*

Finding 4 (Rec., 5307) recites:

"Pending this litigation each of the complainant companies made and delivered to defendants statements showing the earnings and expenses *for certain periods, which statements have been taken by both sides as sufficiently illustrative*

of the situation for the determination of these cases. The companies extended to the state officers, defendants herein, acting by experts by them selected, the opportunity to examine the statements and the books, papers, vouchers, and records of the companies."

Finding 17 (Rec., 5315) recites:

"The periods taken are *representative taken by the experts* upon both sides, and were for the months set forth in the column headed 'time.'"

This came about because the court at the insistence of the state denied (Finding 6, Rec., 5308) a temporary injunction as to passenger rates pending a future test by actual operation. The mere recital by the court that the parties actually agreed upon a period as representative in testing the law is such a statement of an occurrence at the trial as to make the fact binding. The evidence, however, clearly supports the statement. The state's experts prepared statements of results as to each company during these periods according to the theories adopted by it (Exhibits 64, 67, 69, 70, 76, 77, 80, 81, 85, 86, 91, 92, 103, 104, 108, 109; Rec., 4987, 5000, 5002, 5004, 5020, 5023, 5038, 5040, 5056, 5058, 5077, 5080, 5101, 5103, 5115, 5118). Each of these statements was for the "representative period" thus stated to have been agreed upon. Upon full cross examination as to the accounts of each company, the state's experts (Rec., 4556-4598, 4671-3, 4697, 4705-6, 4767-4773, 4774, 4775) made no criticism of the periods suggested, but treated them as representative. In the St. L. & S. F. (Nos. 672-3) and C. R. I. & P. (Nos. 678-681) cases through the representative periods were for three months (Exhibit 2, Rec., 4790; Exhibit 78, Rec., 5026), yet these were accepted as correct though that company also

put in statements for six months (Exhibit 71, Rec., 4970, 5009) and one year (Exhibits 55, 59, 72, Rec., 4969, 4980, 5014) and the C. R. I. & P. also put in a statement (Exhibit 98, Rec., 5090) for one year. After the trial was completed, *by agreement of parties*, the court (Rec., 174) selected two experts from each side, directing them to prepare statements of accounts, which they did (Rec., 175-212) in accordance with the theories of each side. Said order reads:

> "Whereas after the cases above numbered had been submitted and argued *by agreement of all parties*, at the request of the court, James Peabody and F. P. Johnson, expert accountants for the railroad companies, and A. P. Taliaferro and T. A. Hamilton, expert accountants for the defendants, compiled statements showing the earnings, operating expenses, etc., for each of said railroad companies for periods of time as therein stated and affixed a certificate to the effect that said statement in each case correctly shows the results on the various assumptions set forth therein, which said certificate was signed by all four of said expert accountants. It is, therefore, ordered that each of said statements be filed and made of record herein."

Finding 14 (Rec., 5311) upon this subject recited:

> "After the arguments were concluded at the request of the court, and with the consent of the parties, two experts upon each side, two selected by the railways and two by the defendants, worked with the court for something more than one week. These experts were the same gentlemen representing their respective sides who had done much of the work in preparing the cases for the respective sides for hearing. The court requested these experts to take the numerous tables and tabulate them already in evidence and to confine themselves wholly to that which had been introduced in evidence in the cases, and to make therefrom a new table for each of the nine cases showing the earnings and the expenses chargeable to each class of earnings *according to the respective theories* covered by counsel in the arguments. The court further requested said four experts after preparing said new

tables that if they agreed, to affix their signatures thereto. This they did below a certificate reciting that the statement of earnings, operating expenses, etc., as to each particular road *for the time therein given,* correctly shows the results on the various assumptions set forth therein. Said nine statements were by order of this court, February 20, 1909, ordered filed and made of record in the cases. The said nine statements are now and here referred to, and are made part hereof. Each of said nine statements is found by the court to be correct upon the respective theories presented."

So the opinion (Rec., 5300, 5301) states:

"The four accountants, Mr. Peabody and Mr. Johnson representing the railway companies, and Mr. Taliaferro and Mr. Hamilton representing the state, impressed me after hearing them testify and being in consultation with them for ten days after the cases were submitted, that the sole purpose of their work was to exhibit the truth, *differing only as to extra* cost, and that difference of extra cost largely confined to the local passenger traffic, *and differing as to the theory as to how the expenses between local and interstate traffic within the state should be divided.* Aside from those two questions there is not the slightest variance between the testimony of the experts upon the two sides."

The periods as adopted were those which the court in its findings stated were by the parties adopted as representative.

(6) *Correctness of figures and some other conceded facts.*

(a) As already seen, the facts bearing emphatic repetition, the accounts and figures of each company were, long previous to trial, given to the state's experts for verification who "had all the time desired" (Finding 5, Rec., 5308) and found to be absolutely correct, either by an actual examination of the railroad records or by an acceptance of their correctness (Ev. Taliaferro, Rec.,

4566, 4573, 4580, 4705, 4706, 4722, 4767, 4773). Every courtesy was extended and every facility afforded for the state's experts to ascertain the facts (Ev. Taliaferro, Rec., 4557, 4558; Hamilton, Rec., 4634).

(b) If expenses were as between state and interstate business divided upon a revenue basis, then the rates questioned were conceded to be undoubtedly confiscatory (Ev. Taliaferro, Rec., 4556-4598, 4767-4773).

(c) The freight rates under the act of 1907 were correctly ascertained. If they were confiscatory it necessarily follows that those under the act of 1905 must fall (Ev. Douglass, Rec., 3776; Peabody, Rec., 4409; Sturgis, Rec., 4746; Taliaferro, Rec., 4409, 4566, 4772). This fact, independently of the evidence, was *actually conceded* at the trial (Finding 4, Rec., 5308).

(7) *Evidence offered.*

It is to be again noted that outside of a slight difference as to the division of miscellaneous earnings and expenses, which would not change the result (Request 22, Rec., 157-162) the only real difference between the parties was as to whether freight expense, as between the state and interstate business, should be divided upon the basis of ton and passenger miles, or both upon the revenue basis, and how much and in favor of which class of business the extra cost was to be ascertained. There was an agreement as to the representative period. The different theories suggested have been stated. With this in mind the evidence offered, together with the order of its introduction, was this:

(a) In the first, or St. Louis & San Francisco case (Nos. 672-3), it consisted of 623 pages (Rec., 3767-4390) besides exhibits 1-75 (Rec., 4789-5019) and may be thus summarized:

For the company this was the evidence: Alexander Douglass

(Rec., 3767-3815, 4178-4194, 4635-4638, 4644) vice president and general auditor and H. W. Press (Rec., 4478-4480, 4638-4639), his assistant, proved in detail the correctness of the accounts and various compilations, the figures having long before been delivered to and verified by the state's experts. W. B. Doddridge (Rec., 3815-3928) formerly general manager of the Missouri Pacific; Carl Gray (Rec., 3929-4035) vice president of the St. Louis & San Francisco; A. D. Bethard (Rec., 4077-4099) assistant to the general manager of the Missouri, Kansas & Texas; W. T. Tyler (Rec., 4099-4138a), general superintendent of the St. L. & S. F.; W. M. Whitenton (Rec., 4140-4167) a general superintendent of the C. R. I. & P.; William Ellis (Rec., 4194-4276), commerce counsel, C. M. & St. P.; C. J. McPherson (Rec., 4276-4366), superintendent Mo. Pac.; P. S. Eustis (Rec., 4367-4390), general passenger traffic manager C. B. & Q., and J. W. Kendrick (Rec., 4390-4404), vice president A. T. & S. F., in charge of operation, were examined. These witnesses as experts all testified that the revenue was the only fair basis upon which to divide the expenses as between state and interstate business, and that there should be added thereto the extra cost, estimated on the same basis, of doing the state over interstate business. This was by each witness fixed at a figure far in excess of that found below.

R. E. Kimbell (Rec., 4167-4178), auditor of St. L. S. W., William Ellis (Rec., 4194-4210), now commerce counsel of the C. M. & St. P., A. L. Conrad, auditor (Rec., 4448-4455), and James Peabody (Rec., 4404-4448), statistician of the A. T. & S. F., produced tests made upon their respective roads showing in detail, fortified by exhibits, that the extra cost of doing the state over the interstate business was far in excess of the amount found below.

C. Haile (Rec., 4035-4037), vice president and traffic manager of the M. K. & T., testified to the great increase of wages on railroads, producing as exhibit 5 (Rec., 4821) a table showing that

from 1900 to 1908 that increase averaged 26.5 per cent. C. J. McPherson (Rec., 4276-4286), assistant to the general manager of the Mo. Pac., likewise testified. Mr. Haile also testified that the fixing of a state rate necessarily determined that of the interstate, giving his reasons therefor. Among other things there was produced (Rec., 4043) the masterly article of Robert Mather (Exhibit 4, Rec., 4806) upon the subject, the reasons therein given commending themselves to his judgment as an expert so that he adopted and presented, as his own, the views thereof.

Frank Nay (Rec., 4456-4477), auditor of the C. R. I. & P., and C. L. Stone (Rec., 4480-4487) testified that the reduction of state rates in Missouri reduced the interstate and made many tabulations showing that the two cent fare rate did not increase travel. James Peabody (Rec., 4652-4668, 4683-4686) prepared like tables (Exhibits 38-40, Rec., 4931-4934). W. B. Doddridge (Rec., 4487-9) testified that the value of the St. L. & S. F. R. Co. was three times its assessed value. These witnesses produced exhibits Nos. 1-60 (Rec., 4789-4980) and Nos. 67-75 (Rec., 5000-5018). Upon the part of the state, its two experts, A. P. Taliaferro (Rec., 4490-4598) and T. A. Hamilton (Rec., 4598-4635) testified as to the statements produced as representing their theories, the figures used by the railroad auditors having been adopted as correct, producing exhibits 60-66 (Rec., 4981-4991). Upon cross examination the statements of the railroad auditors were conceded to be correct, if the revenue theory of dividing expenses was found to be right.

(b) All the evidence taken before the master in three abandoned cases was put in (Rec., 4489, 4637) as a *lump* offer.

(c) In each of the cases tried, the auditor of each road and the state's experts testified as to their accounts and figures upon their respective theories.

(St. L. & S. F. Case, Ev. Douglass, Rec., 3767-3814; Press, Rec., 4478-4479, 4638-4643; A. P. Taliaferro, Rec., 4554-4598; A. T. & S. F. Case, Conrad, Rec., 4448-4455; Peabody, Rec., 4404-4447, 4652-4662, 4683-4686; Taliaferro, Rec., 4670-4673; C. R. I. & P. Case, Frank Nay, Rec., 4687-4696; Taliaferro, Rec., 4697; K. C. S. Case, R. J. McCarty, Rec., 4698-4705; Taliaferro, Rec., 4706; St. L. & H. Case, Worland, Rec., 4707-4710; M. K. & T. Case, Seelig, Rec., 4713-4722; Taliaferro, Rec., 4722; K. C. C. & S. Case, Smith, Rec., 4725-4741; C. B. & Q. Case Sturgis, Rec., 4743-4762, 4773; Taliaferro, Rec., 4767-4773, 4774; C. G. W. Case, H. Ernst, Rec., 4776-4779).

These witnesses identified and proved Exhibits 45 (Rec., 4939) and 73 to 109 inclusive (Rec., 5017-5121) containing upon the respective theories of the companies the statements of the various roads other than the St. L. & S. F. R. Co. (Nos. 672-673), whose cases were being tried. The state's expert conceded these statements to be correct.

W. B. Doddridge (Rec., 4780-4781) testified that with the two exceptions, where the rates were conceded to be confiscatory, the actual value of each road was at least three times the state assessment or equal to the value fixed by the assessing board. This with the exhibits completed the evidence in all of the cases.

(8) *Correctness of the figures of each company.*

(a) Regardless of what may have been the facts under the law of 1905, or at the hearing before the master, the books, accounts, and figures of each company presented *upon the oral hearing*, as to the rates fixed by the acts of 1907 were absolutely correct and so conceded to be. Not only was such the evidence of each auditor and accountant of each railroad company, but the experts of the state so testified, as will readily appear from these references:

(b) Case Nos. 672-3, St. L. & S. F., Alexander Douglass (Rec., 3767-3815; 4178-4194, 4635-4638), vice president and general auditor, and H. W. Press (Rec., 4478-4480; 4638-4644), his assistant, went into every detail of the accounts of their company, producing various statements of figures which had been from time to time given to the state expert (Rec., 3770) for their verification from the books of the company and of which figures they never made (Rec., 3770, 3771) complaint. Among the statements so offered were Exhibit 2 (Rec., 4790), the earnings and expenses for three months from July to September, 1907, inclusive, with some divisions and classifications shown by exhibits 3 (Rec., 4804) and 8, 9, 10 (Rec., 4898, 4900, 4902); also exhibit 57 (Rec., 4970) for the six months ending December 31, 1907.

The state's experts Taliaferro (Rec., 4558-4559, 4565-4568, 4573) not only conceded the figures to be right but expressly (Rec., 4573) testified that they were.

(c) Case Nos. 674-5, A. T. & S. F., A. L. Conrad (Rec., 4448-4456), auditor of the company, and James Peabody, chief statistician (Rec., 4652-4662; 4683-6), likewise testified as to the correctness of the figures of that company which had been submitted to and the books checked by the state's experts. Exhibit 45 (Rec., 4939) was a detailed statement of the earnings and expenses for a six months' period and accords with the special findings. To the correctness of this statement to which Mr. Taliaferro, the state expert (Rec., 4671, 4672) expressly agreed.

(d) Case Nos. 678-81, C. R. I. & P., Frank Nay (Rec., 4687-4697), its general auditor, testified as to the figures of the C. R. I. & P. Co., producing exhibits 78 and 79 (Rec., 5026, 5037) showing in detail the figures as to this company. Its correctness was not challenged but conceded by Mr. Taliaferro (Rec., 4697).

(e) Case Nos. 682-3 K. C. S. The accounts of the company were proven by its general auditor, R. J. McCarty (Rec., 4698-

4702), who produced exhibits 82 and 83 (Rec., 5043, 5055) and testified to their correctness, the figures having theretofore been given to the state's expert, Taliaferro, for verification, who, in testifying, conceded (Rec., 4705-6) them to be correct. He relied on the auditor's figures in his own statements (Rec., 4705).

(f) Case Nos. 684-5, St. L. & H. J. M. Worland, auditor of this company, testified (Rec., 4707-4708) to the correctness of his statement, producing exhibits 87 and 88 (Rec., 5060, 5064). The state's experts, Taliaferro and Hamilton, did not testify as to this road, but they were two of the four experts selected by the court by consent (Rec., 174) not only approving (Rec., 196) the figures as presented but confessed confiscation by adding the words:

> "It is apparent from the results above shown that upon neither the revenue nor the ton mile and passenger theory can any adequate return on the investment be earned."

(g) Case Nos. 690-1, M. K. & T. W. L. Seelig, general auditor of the company, proved (Rec., 4713-4722) the correctness of the figures set forth in exhibit 89 (Rec., 5065). The state's expert Taliaferro, did not deny, but accepted and used (Rec., 4722) these figures as correct.

(h) Case Nos. 130, 134, C. B. & Q. The statements of this company (Exhibits 98-102, Rec., 5090-5105) were fully proven by its general auditor, C. I. Sturgis (Rec., 4743-4762, 4773). They were admitted to be correct by the state's expert (Ev. Taliaferro, Rec., 4767-4772, 4774; Exhibits 103-105; Rec., 5101-5105).

(i) Case Nos. 698-9, K. C. C. & S., E. M. Smith, auditor of this company (Rec., 4725-4742), testified to the figures of his account, producing exhibits 93 and 93a (Rec., 5080, 5082). The state expert did not testify as to this company, but he and his associate, Hamilton, signed a statement (Rec., 196) acknowl-

edging its correctness and as in case Nos. 684, 685, St. L. & H., stated:

> "It is apparent from the results above shown that upon neither the revenue nor the ton mile and passenger mile theory of expenses can any adequate return on the investment be earned."

(j) Case Nos. 700-1, C. G. W. H. Ernst, auditor of this company (Rec., 4776-9), testified as to statements produced as Exhibits 106 and 107 (Rec., 5106, 5115). The state's expert did not testify upon this subject, but accepted and adopted the figures (Rec., 4779) producing exhibits 108, 109 (Rec., 5115, 5118), based therein.

(k) The remaining cases not tried were Nos. 676-7 (St. L. S. W.), 686-7 (Mo. Pac.), 688-9 (St. L. I. M. & S.), 692-3 (Q. O. & K. C.), 694-5 (Wabash), 696-7 (St. J. & G. I.), 702-3 (C. M. & St. P.), and 704-5 (C. & A.), which were to abide the result of others. Thus, that of the St. L. & S. (Nos. 676-7) was (Rec., 4686) to abide that of the St. L. I. M. & S. (Nos. 688, 689); those of the Mo. Pac. (Nos. 686-7), St. L. I. M. & S. (Nos. 688-9), Wabash (Nos. 694-5) and C. & A. (Nos. 704-5) were (Rec., 4712, 4713, 4723, 4724) to abide that of the C. B. & Q. (Nos. 130, 134); those of the Q. O. & K. C. (Nos. 692-3) and St. J. & G. I. (Nos. 696-7) that (Rec., 4723, 4724) of the C. G. W. (Nos. 700-701); and that of the C. M. & St. P. (Nos. 702, 703) that (Rec., 4724) of the St. L. & S. F. (Nos. 672-3). Thus eight cases below comprising sixteen here, are not now involved. If the cases of the C. B. & Q. (Nos. 130, 134) of C. G. W. (Nos. 700, 701) or of the St. L. & S. F. (Nos. 672-673) should be reversed, then and in that event alone, would arise the question as to what should be done with the decrees therein. No right was reserved to either road to appeal nor to abide the result of the other cases upon appeal. The

effect to be given to the stipulations therein, is alone in the court below.

(8) *Value of the property.*

(a) The parties admitted (Rec., 752, 4634), and the agreed figures on both sides (Rec., 175-212) showed that the valuation by the State Board of Equalization of the property of each railroad was one-third of its estimate of actual value of the property assessed by them. This did not include (Rec., 4634) a large amount of railroad property which is assessed locally (Rev. Sts. Mo., Sec. 9360, 9361) at two and a half or three times its value (Rec., 4634). These values of all the property in the state were as thus found (Finding 11, Rec., 5311) by the court:

	Miles	Value	Value Per Mile
St. Louis & San Francisco	1688.89	$61,238,414.70	$36,259.00
Atchison, Topeka & Santa Fe	348.31	15,091,212.00	43,326.00
Chicago, Rock Island & Pacific	515.48	19,102,507.59	37,058.00
Kansas City Southern	174.48	8,039,084.40	46,075.00
St. Louis & Hannibal	120.61	1,143,077.02	9,477.00
Missouri, Kansas & Texas	506.21	20,894,229.93	41,276.00
Chicago, Burlington & Quincy	1136.34	53,172,907.83	46,793.00
Kansas City, Clinton & Springfield	151.01	2,380,222.48	15,762.00
Chicago Great Western	84.43	3,605,236.38	42,701.00

As to these figures, it was also found (id):

"With the exceptions hereinafter stated, the above valuations of the properties of said nine companies as fixed, are in fact *practically* the same as those fixed by the state assessing board for the purpose of taxation. *But aside and apart from the valuations thus fixed by the state board, these findings are that upon the whole evidence said properties are at least of the values above fixed.* * * * In fixing the valuations above set forth there have been considered the immense terminal values of most of the roads, the amount of stock and bonds outstanding, what it would cost to duplicate the properties both with and without terminals in the large cities,

and all the evidence bearing on present values, and in fixing said valuations the sums found are the minimum valuations, the properties being worth at least the sums thus fixed."

The percentages representing the assignable value were set forth in finding 17 (Rec., 5315-5316). The four experts, by consent (Rec., 174) appointed by the court, agreed (Rec., 175-212) upon these valuations as correctly representing such figures adopted by each side as to each road. The figures with the percentages applied were, by the state's expert, conceded to be correct in each statement prepared by him as the state's theory of the cases. See cases Nos. 672-3, St. L. & S. F., exhibits 61 (Rec., 4984) and 64 (Rec., 4988); cases Nos. 674-5, A. T. & S. F., exhibits 76 (Rec., 5022) and 78 (Rec., 5025); cases Nos. 678-81, C. R. I. & P., exhibits 80 (Rec., 5040) and 81 (Rec., 5042); cases Nos. 682-3, K. C. S., exhibits 85 (Rec., 5057) and 86 (Rec., 5060); cases Nos. 690-1, M. K. & T., exhibits 91 (Rec., 5079) and 92 (Rec., 5081); leaving the sum blank which is explained by the statement in evidence (Rec., 4722) adopting the figures of exhibit 89 (Rec., 5068); cases Nos. 130, 134, C. B. & Q., exhibits 103 (Rec., 5102) and 104 (Rec., 5105); cases Nos. 684-5, St. L. & H., and Nos. 698-9, K. C. C. & S., in which the state made no statements but accepted (Rec., 4712, 4742) the railroad statements as contained in exhibits 88, 93a (Rec., 5064, 5087), the values as to these companies reduced one-third by the evidence of W. B. Doddridge (Rec., 4781), so that as to these two roads the values fixed by the assessing board were one-half of its estimate of the real value, whereas in each of the other cases it was one-third. Each statement presented by a railroad auditor likewise took the values and percentages so found by the state board. This was true as to the St. L. & S. F. case, Nos. 672-673 (Exhibit 2, Rec., 4793), A. T. & S. F. case, Nos. 673-4 (Exhibit 45, Rec., 4942), C. R. I. & P. case, Nos.

678-81 (Exhibit 78, Rec., 5028), K. C. S. case, Nos. 682-3 (Exhibit 87, Rec., 5066), M. K. & T. case, Nos. 690-91 (Exhibit 89, Rec., 5068), K. C. C. & S. case, Nos. 698-9 (Exhibit 93a, Rec., 5087), C. B. & Q. case, Nos. 130, 134 (Exhibit 98, Rec., 5092) and C. G. W. case, Nos. 700-701 (Exhibit 105, Rec., 5109).

(b) The actual bonded indebtedness of the entire system of the C. B. & Q. was (Rec., 1383) $174,172,000 and stock $110,839,100, or a total of $285,011,100. Upon these bonds interest had always theretofore been paid, and eight per cent dividends (Rec., 4757) upon the stock. The earnings in Missouri are at least twenty per cent of all the earnings of the system (Ev. Fisher, Rec., 1001; Ev. Sturgis, Rec., 265), so that by a division upon a revenue basis there should, of stock and bonds, be allotted to Missouri $57,002,200, or more than the value found below. The actual market value of the Missouri part of the A. T. & S. F. was (Ev. Peabody, Rec., 4656; Ex. 74, Rec., 5018) $21,167,763.59 as against the finding (Rec., 5311) of $15,091,212. The Missouri proportion of the bonded debt of the St. L. & S. F. was (Rec., 4803) $67,724,987.87; of stock $17,060,874.52 (id.) The total value found was (Rec., 5311) but $61,238,414.70. The Missouri proportion of bonds of the C. R. I. & P. (Rec., 5037) was $17,553,306.89, and of stock $7,432,760.43. The valuation actually found (Rec., 5311) was $19,102,507.59. The Missouri proportion (Rec., 5055) of the K. C. S. was, of bonds, $7,979,542.78, of stock $11,211,570.14. The value found (Rec., 5311) was $8,039,084.40. Of the M. K. & T. (Rec., 5074) the proportion was, of bonds $24,213,185, and of stock $14,603,125, as against a valuation found (Rec., 5311) of $20,894,229.93. Since in the absence of other proof, as was the case here, with all by the St. L. & H. and K. C. C. & S. (Finding 9, Rec., 5310; Opinion, Rec., 5302) bonds and stock presumptively represent the value (*Ames* v. *Union Pac. R. Co.*, 64 Fed. Rep., 165, 177; *So. Pac. R. Co.* v.

Bartine, 170 Fed. Rep., 725, 751) these comparisons are of great significance.

(c) A new line of the C. B. & Q. was built in 1904 and 1905 in Missouri from Old Monroe to Mexico, freed from any city terminals, the actual cash cost of which, without equipment or terminals averaged $45,867.05 per mile (Ev. Fisher, Rec., 842). The C. R. I. & P. had at the time of the trial just completed the construction between St. Louis and Kansas City of a road which actually cost from $50,000 to $70,000 per mile, exclusive of terminals (Ev. Nay, Rec., 4690, 4691, 4696). W. B. Doddridge, an expert of great experience, testified (Rec., 1578, 1579, 1605, 4463, 4468, 4490, 4491, 4668, 4780) that each railroad property in Missouri, excepting the St. L. & H. and K. C. C. & S. was of a value in excess of that estimated by the state board, and in excess of three times the assessed value, and that a new road without terminals or equipment could not be built for $40,000 per mile. Detailed statements of all the railroad properties in the state (Rec., 5121-5240) were exhibited, with their assessed values admitted and proven to be at one-third the board's estimate of their value (Admission, Rec., 4634; Ev. Doddridge, Rec., 4780, 4781) with the exception of the K. C. C. & S., and St. L. & H., which were (Rec., 4781) said to be worth twice the amount of their assessed value. Frank Nay testified (Rec., 4689-90) that the C. R. I. & P. was worth at least three times its assessed value. Statements of earnings and expenses, mileage, bonded debt and capitalization of many of the roads (Ex. 1, Rec., 1230; Ex. 5b, Rec., 2386; Ex. 4, Rec., 3328; Ex. 2, Rec., 4790; Ex. 45, Rec., 4939; Ex. 78, Rec., 5028; Ex. 87, Rec., 5066; Ex. 89, Rec., 5065; Ex. 93, Rec., 5082; Ex. 98, Rec., 5090; Ex. 106, Rec., 5106) were exhibited, and were the subject of comparison with the C. B. & Q., which was the greatest earner per mile of all. The state's expert refused (Rec., 4573, 4579) to say what, if any, valuation should be taken as the basis

upon which rates should be allowed. But as already seen in his statement and in that of the four experts, the figures adopted by the court were taken as correct. So upon the question of the values there is no difference between the parties. Therefore, the findings of minimum value were overwhelmingly established, and hence must be here sustained.

(9) *Expenses as between state and interstate business should be divided upon the basis of revenue.*

This was, below, the main and chief point of difference (Finding 14, Rec., 5311; Opinion, Rec., 5300, 5301). For if the revenue basis be adopted and the minimum extra cost be allowed, the rates in question are confiscatory as to every road upon the freight rate, considered alone, and upon both freight and passenger rates considered together.

(a) Johnson's exhibit 55, Missouri Pacific case (Rec., 2452) fortified by Sturgis' exhibit 41 (Rec., 1441) in the C. B. & Q. case, when the cases were before the master, specifically gave reasons for this method of division.

(b) The auditors of all the roads adopted the method as correct. (St. L. & S. F. Ex. 2, Rec., 4790; A. T. & S. F. Ex. 45, Rec., 4939; C. R. I. & P. Ex. 78, Rec., 5026; K. C. S. Ex. 82, Rec., 5043; St. L. & H. Ex. 87, Rec., 5060; M. K. & T. Ex. 89, Rec., 5065; K. C. C. & S. Ex. 93, Rec., 5082; C. B. & Q. Ex. 98, Rec., 5090; C. & G. W. Ex. 106, Rec., 5106.)

(c) The best railway experts in the world favor it, giving many reasons for their views in addition to those set forth in the Missouri Pacific Exhibit 55 and Burlington Exhibit 41. Among these experts so testifying were Carl Gray, Vice President and General Manager of the Frisco (Ev. Frisco Case, Rec., 3929-3939, Cross Ex., Rec., 3940-4034); C. J. McPherson, Manager of

the Missouri Pacific (Rec., 4288-4307); W. T. Tyler, General Superintendent Frisco (Rec., 4099-4112); W. H. Whitenton, Superintendent Chicago, Rock Island & Pacific (Rec., 4140-4142); J. W. Kendrick, Vice President of the Santa Fe (Rec., 4390-4399); William Ellis, Commerce Counsel of C., M. & St. P. (Rec., 4194-4220); B. H. Bethard, General Manager Missouri Pacific (Rec., 1821-1834); St. L. & S. F. Case (Rec., 4077-4092); W. B. Doddridge, Former General Manager Missouri Pacific. Upon the hearing before the master in the abandoned cases there was much evidence of the same character from W. B. Doddridge (Rec., 1568-1629, 1647-1654, 1769-2273); D. C. Buell, Assistant to President of Frisco (Missouri Pacific Case) (Rec., 1794-1799); W. C. Stith, General Traffic Manager of Missouri Pacific (Rec., 1465-1542, 1770-1773); C. I. Sturgis, General Auditor of the C., B. & Q. (Burlington Case, Rec., 229-425, 707-709, 1078-1133); Howard Elliott, President Northern Pacific (Rec., 426-492); George B. Harris, President C. B. & Q. (Rec., 536-554); Darius Miller, General Traffic Manager of C. B. & Q. (Rec., 605-618); George H. Crosby, Assistant General Manager of C. B. & Q. (Rec., 555-558, 846-847).

The finding that revenue basis was right, as the original or equal division, was therefore sustained by the overwhelming weight of the evidence.

(10) *To do the state business cost far more than to do the interstate, the extra cost being far in excess of the percentage fixed by the court.*

(a) The following were the estimates of the railroads of extra cost of state business over interstate business, upon a revenue basis where not otherwise indicated, after the witnesses had been examined and cross-examined at great length, each giving his reason for his conclusion:

Bethard, B. H., General Manager of the M. K. & T.: Passenger, 40 to 65 per cent (Frisco Case, Rec., 4078); freight, 4 or 5 times (Mo. Pac. Case, Rec., 1824).

Buell, D. C., Assistant to President, St. L. & S. F.: freight, 3 times (Mo. Pac. Case, Rec., 1794-1799).

Clark, H. G., General Superintendent of Mo. Pac.: freight, 4 or 5 times on ton mile basis (Mo. Pac. Case, Rec., 1630-1631).

Crosby, Geo. H., Assistant General Traffic Manager, C. B. & Q.: freight, 3 to 5 times (Burlington Case, Rec., 583).

Doddridge, W. B., former General Manager of Mo. Pac.: freight, ton mile theory, 4 times (Frisco Case, Rec., 3822); freight, revenue theory, 2 times (Frisco Case, Rec., 3822); freight, 3 to 6 times, 3 being minimum (Mo. Pac. Case, Rec., 1584-1595, 1596); passenger, 25 per cent (Frisco Case, Rec., 3827).

Elliott, Howard, President Nor. Pac.: freight, 3 times (Burlington Case, Rec., 427, 484); 6 times on ton mile basis (id).

Ellis, Wm., Commerce Counsel, C. M. & St. P.: Passenger, 50 per cent very low (Frisco Case, Rec., 4196); freight, a great deal more than 300 per cent (Frisco Case, Rec., 4197).

Eustis, P. S., General Passenger Agent, C. B. & Q.: Passenger, 50 per cent (Frisco Case, Rec., 4368).

Fisher, W. T., head of weighing and inspection department, Mo. Pac.: freight, 2 to 6 times (Mo. Pac. Case, Rec., 1753).

Gray, Carl, Vice-President and General Manager, St. L. & S. F.: passenger, 20 to 30 per cent (Frisco Case, Rec., 3939); freight, 3 to 5 times (Frisco Case, Rec., 3931).

Gray, Henry, Comptroller of the Northern Pacific: freight, 7 to 11½ times on ton mile basis (Burlington Case, Rec., 620).

Harris, Geo. B., President, C. B. & Q.: freight, 3 to 5 times as much (Burlington Case, Rec., 540).

Kendrick, J. M., Vice-president A., T. & S. F.: passenger, 30 to 100 per cent (Frisco Case, Rec., 4399).

Kimbell, R. E., Assistant General Auditor, St. L. S. W. Ry.

Co. (Frisco Case, Rec., 4177); freight, by actual test, from 3 to 4 times (id. Exhibit 6, Rec., 4821).

Miller, Darius, Traffic Manager, C. B. & Q.: freight, 3 times, conservatively (Burlington Case, Rec., 607).

Miller, Henry, General Manager, Wabash: freight, 2 or 3 times, ton mile basis (Wabash Case, Rec., 2829).

McPherson, C. J., Assistant General Manager, Missouri Pacific: freight, several times (Frisco Case, Rec., 4300); passenger, more than 25 per cent (Frisco Case, Rec., 4307).

Peabody, James, Accountant, A. T. & S. F.: by actual test, freight over 3 times, passenger, 47.2 per cent (Frisco Case, Rec., 4408).

Rainey, S. L., Assistant to General Manager, St. L. & S. F.: freight, 3 or 4 times (Mo. Pac. Case, Rec., 1837).

Rawn, I. G., General Manager, Ill. Cent.: freight, 3½ times on ton mile basis (Burlington Case, Rec., 572).

Stith, W. C., Traffic Manager, Mo. Pac.: 2½ times for freight (Mo. Pac. Case, Rec., 1496).

Stuart, J. S., General Manager, Erie R. R.: freight, 5 to 8 times, ton mile basis (Burlington Case, Rec., 691).

Sturgis, C. I., General Auditor, C. B. & Q.: freight 3 to 7 times (Burlington Case, Rec., 245-246-397).

Tyler, W. T., General Superintendent, St. L. & S. F.: freight 3 to 5 times (Frisco Case, Rec., 4101): passenger, 35 to 40 per cent (Frisco Case, Rec., id).

Whittenton, W. M., General Superintendent, C. R. I. & P.: freight 3 to 6 times (Rec., 4142; passenger, 25 to 50 per cent (Frisco Case, Rec., 4140).

Williard, Daniel, General Manager, C. B. & Q.: freight 3½ times, ton mile basis (Burlington Case, Rec., 494, 535).

Where in this list there are references to the Burlington, Missouri Pacific and Wabash cases, the meaning is that the evidence was taken while the cases were pending before the master.

(b) It will be observed that these estimates are much in excess of the percentages fixed by findings 7 and 8 (Rec., 5310, 5311) where it is said that state freight cost fifty per cent more than interstate, and state passenger business twenty-five per cent more. The court below reduced the allowance in the excess of caution and to meet fully for the excess of revenue received per mile of state haul, which Judge Hook in Oklahoma (*M. K. & T. R. Co.* v. *Love,* 177 Fed. Rep., 493, 499, 500) and Judge Sanborn in the Minnesota case (*Shepard* v. *Nor. Pac. R. Co.,* 184 Fed. Rep., 765) said were proper elements to be considered and for which some allowance should be made. So the trial judge (Finding 8, Rec., 5310) said that while his figures had been fixed at a minimum, they as a whole brought a result which was "fair and representative and just."

(c) The fact that some of the estimates of extra cost before the master are upon the ton mile basis is no indication that the witness thought the equal division of expenses should be upon that basis. Howard Elliott (C. B. & Q. Case Nos. 130, 134, Rec., 484) and W. B. Doddridge (St. L. & S. F. Case, Nos. 672, 673, Rec., 3822) pointed out that it came to the same end, the total expense being that ascertained upon an equal basis plus the extra cost. If the ton mile theory be adopted, the latter should be ascertained by using a higher multiple than would be used upon a revenue basis. This was made in the Minnesota (184 Fed. Rep., 765, 813, 815) and Arkansas (187 Fed. Rep., 290, 320-344) cases. The total expense is the sum total of the two. So the trial judge (Finding 8, Rec., 5310) found. In the opinion (Rec., 5297) he emphasized the fact found giving many reasons for his conclusion. This subject will, in the argument, be dealt with in some detail.

(11) *The freight rates were unreasonable and unjust, irrespective of general confiscation, and not fair compared with those of other states.*

These facts were overwhelmingly proven, even as to the act of 1905 (Ev. Stith, Rec., 1543-1563, 1770-1773; Crosby, Rec., 555-558, 578-604, 846-847; Darius Miller, Rec., 605, 618). Findings 9 (Rec., 5311), 15 (Rec., 5313-5314), 16 (Rec., 5315) and 19 (Rec., 5318-5326) are based on this evidence. No more unfair statement of the evidence could have been made than that retailed by the attorney general to the governor (Appendix 9) and by the latter forwarded to the legislature as an appeal for a law which would prevent the continuance in the federal court of the litigation he had invited.

(12) *The state rates in question directly affected interstate rates.*

Finding 3 (Rec., 5306-5307) explicitly states that the state rates in question had the direct effect of reducing all interstate rates. The unanswerable views of Robert Mather (Exhibit 4, Rec., 4806-4820) were proven (Ev. Haile, Rec., 4035-4076) to be sound. The testimony of the witnesses (Ev. Haile, Rec., 4035-4076; W. C. Stith, Rec., 1543-1563, 1770-1773; Geo. H. Crosby, Rec., 555-558, 578-604, 846-847; Darius Miller, Rec., 605-618; Bethard, Rec., 4077-4098; Kendrick, Rec., 4390-4403) made it impossible for the court below to find the fact other than it did.

The map (Exhibit 1, Rec., 4789) is a demonstration. So also the cross examination of A. B. Taliaferro (Rec., 4584-4586) established the fact.

(13) *The two cent fare did not increase travel.*

This was demonstrated with great accuracy by one who kept statistics (Ev. Nay, Rec., 4456-4474; Exhibits 48-56, Rec., 4960-4970) and the fact was found below (Finding 10, Rec., 5310-5311. Ev. Peabody, Rec., 4410-4418; Exhibits 38, 40; Rec., 4931-4935. Stone, Rec., 4480-4482).

25. Opinion of Judge Philips Upon Application for a Temporary Injunction in 1905.

Through oversight this does not appear in the record but will be printed as part of the appendix hereto (Appendix No. 8).

26. Report of the Attorney General in 1907.

The report of the then attorney general, transmitted by the governor to the legislature, is attached hereto as Appendix 9. It urged the repeal of the Act of 1905, and the evasion of the jurisdiction of the federal courts.

27. Questions to be Considered.

Such being the case and the state of the record, we proceed to a consideration of the questions involved so far as they can be gathered from the assignment of errors and the conduct of the trial below. We have not yet had the benefit of the views of the state, hence, must deal with the situation in a more general aspect than would have been the case had we, before the preparation hereof, seen the brief of the other side. The questions herein and the order in which they will be considered are:

(a) The laws fixing the rates sought to be enjoined, and the questions arising in reference thereto (*Infra*, Division 1).

(b) The effect to be here given to the finding of fact that the rates were confiscatory (*Infra*, Division II).

(c) Whether determined from the findings of fact or from the evidence, the rates are confiscatory (*Infra*, Division III).

(d) In determining whether the rates were confiscatory, it is immaterial whether the railroad would or could make up its losses by charging more or less to other traffic (*Infra*, Division IV).

(e) The decision below was in any event right because the laws under which the rates were imposed are invalid, they directly affecting interstate commerce, and being discriminatory (*Infra*, Division V).

(f) There was the right to continue the litigation by bills filed against the rates fixed by the acts of 1907, whether the new pleadings be considered original or supplementary bills (*Infra*, Division VI).

(g) If the rates were confiscatory or the laws invalid, there was the right to enjoin (*Infra*, Division VII).

(h) The railroad commissioners have no cause for complaint because they were enjoined from enforcing the passenger rate act (*Infra*, Division VIII).

(i) One-half the costs in each case was improperly assessed against each railroad company (*Infra*, Division IX).

28. Special Finding of Facts.

The facts specially found by the court below (Rec., 5305-5328, unnecessarily reprinted in the records of cases Nos. 672-705), the references to the record in parentheses and italicized headings being supplied by the writer, are:

The state officers refused to submit requests for findings, thus leaving the court to cover, without their aid, every question in the case.

"Prior to the argument the Court requested counsel on both sides to submit requests for findings of fact. Complainants' counsel did this. Defendants' counsel have not done so. Complainants' requests have been considered, some of which are embodied within the following findings, and some are not.

The following are the findings of fact that the court makes as based upon the evidence herein:"

The findings cover the entire railroad situation in Missouri.

"1. The complainants are the eighteen railroad companies owning and operating lines of railroad in Missouri, they doing all of the state and interstate railroad business therein, and all of them except the St. Louis & Hannibal Company having lines of railroad both within and without the state. That company is wholly within the state, extending from Hannibal, Missouri, to the south 120.61 miles. The Kansas City, Clinton & Springfield Company is a road of about 160 miles in length with 151.01 miles in the state. All the other companies have lines extending into a number of other states, one of them extending into thirteen other states and territories. These roads with their own lines and with their connecting carriers, carry all the traffic and do all the business, freight and passenger, within the state, whether of state or interstate character. The intrastate business is at all times herein referred to as state business. That part of the interstate business which neither originates within, nor has its destination within, but passes across the state of Missouri, is called trans-state business."

Same properties must necessarily do the state and interstate business.

"2. The same roadbed, locomotives, cars, and trains including all facilities, are used for both classes of business, state and interstate. It is not practicable to conduct the business in any other way. This is so both from the standpoint of the public and that of the companies. If state business were to be carried alone upon some cars and trains, and interstate alone upon others, the expense would be enormously increased, and

almost if not quite prohibitive, while the public would be subjected to delays, inconveniences, and great expense. By reason of all this the business cannot practicably be separated." (Rec., 5306).

State rates as a matter of fact, affect interstate.

"3. Both from a geographical and railway standpoint Missouri is situated differently from the other states of the Union, there only being two or three other states that have a resemblance to it in these particulars, and each of them in a lesser degree. This is so because the Mississippi is its boundary on the east all the distance. From a railroad standpoint the Missouri River is its boundary line on the west, although physically the Missouri River is only the western boundary line from the northwest corner of the state about half way to the southwest corner. But at the half way point, namely, Kansas City, the river turns directly to the east, and continues its way to the Mississippi River. In its production, business, and commerce all that part of Missouri to the north of the Missouri River is practically like the south half of Iowa, the country districts producing large quantities of live stock and grain for the market, as well as much bituminous coal. The south half of Missouri is entirely different. The amount of grain and live stock is much less than in the north half of the state. But the south half has a large amount of timber, stone, lime, lead, zinc, iron, and fruits. St. Louis on the east is a city of nearly a million people, Kansas City on the west nearly half as many, while St. Joseph has more than one hundred and twenty-five thousand people. These three cities carry on large manufacturing interests. The grain, live stock, and packing house interests at Kansas City and St. Joseph are enormous. For a third of a century or more for reasons which need not be repeated, rates from the East were fixed to the Mississippi River, and later on, from thence to the Missouri River. The interstate rates either in or out were the one plus the other. It was the same from the West. It was likewise the same for the trans-state business going in either direction. Such is the method existing today. This brought about the fact which for years has existed and exists today, that the short line of road between the two rivers fixes the freight rates. To illustrate, the Burlington road is the short line between the rivers, being 198

miles from Hannibal to St. Joseph, and the same distance, within a few miles, to Kansas City. The roads between Kansas City and St. Louis, and there are four at least of them, including the Burlington, is an average distance of nearly 300 miles, but some of the roads being fifty miles or more farther between the points than the others. This brings about the fact that all freight rates between any one point on the one river and any point on the other river are the same as the rate from Hannibal to St. Joseph over the Burlington line. That is to say, the freight rates on any road regardless of distance are the same between St. Louis and either Kansas City or St. Joseph that they are between Hannibal and St. Joseph over the Burlington line. This has given the three cities of St. Louis, Kansas City, and St. Joseph great advantages over other points. Competent persons say that to change this system will work irreparable harm to the three cities named, as well as to all other places within the state, by driving both the jobbing and manufacturing (Rec., 5307) business to seaboard points. As to this no finding is made nor opinion expressed because it is believed to be a matter of policy upon which this court in these cases should express no opinion. As to the passenger rates, by reason of competition the fare is the same between Kansas City and St. Louis, the shorter line fixing the rates, thereby compelling the longer road to be at much expense without remuneration. This is likewise true as to all competitive points.

As to the foregoing question of rates and fares, there is no United States statute governing the same, and there is no Missouri statute upon the subject except the two statutes questioned by the bills, one dealing with certain commodities per car per distance, and the other fixing the passenger fares at two cents. Aside from these two statutes, and as to any bearing they have as to charges between the two rivers, the conditions named have been brought about and exist today by reason of a long time custom and by reason of transportation, actual and probable upon the two rivers.

Still further bearing on the question are the following facts: Joplin is a city in the southwestern part of the state of more than twenty-five thousand people. There are a number of towns adjacent thereto, giving that county (Jasper) a population of 200,000 people. It is a very large mining district of lead and zinc. Between Kansas City and Joplin three of complainants herein have railroads. The Missouri Pacific at all points between the said places is within the state. Each

of the other two between said points is partly without the state, starting within and going out and coming back, thereby making it interstate business as to two of the roads between Kansas City and the Joplin district. Between Kansas City and St. Joseph, four roads do the business. The Missouri Pacific and Chicago Great Western is each part of the distance within the state of Kansas, while the Burlington and St. Joseph & Grand Island Company is each wholly within the State of Missouri between the two cities. Between St. Joseph and St. Louis two of complainants do practically all the business, which is very large in both passenger and freight. These are the Burlington and Missouri Pacific. Between said cities the Burlington line is wholly within the state. But the Missouri Pacific line is partly within the State of Kansas, crossing the Missouri River at Atchison and coming back into the state at Kansas City. On the foregoing facts the finding is that the short line between two competitive points necessarily fixes the rates, and the Missouri statutory rates under the statutes in question fix the rates between the cities named. But this is so solely because of the geographical location of cities and railroads, and competition, and long time custom. It is not so either because of a statute or any judicial determination by any of the courts of Missouri."

Agreed test period.

"4. Pending this litigation each of the complainant companies made and delivered to defendants statements showing the earnings and expenses for certain periods, which statements have been taken by both sides as sufficiently illustrative of the situation for the determination of these cases. The companies extended to the state officers, (Rec., 5308) defendants herein, acting by experts by them selected, the opportunity to examine the statements and the books, papers, vouchers, and records of the companies."

Freight rates of 1905 *confiscatory if those of* 1907 *are.*

"The freight rate statute of 1907 as to commodities mentioned allowed greater rates than did the statute of 1905 assailed by the original bills of complaint herein, and it was con-

ceded at the trial that if the rates fixed by the Act of 1907 were confiscatory, that those fixed by the Act of 1905 were likewise."

State given all time desired and every opportunity to check railroad figures.

"5. The parties were producing evidence and preparing their evidence for about one year with the aid of experts on each side. These experts were all men of high character and great proficiency as railroad accountants. The experts on each side were given the fullest opportunity and all the time desired to obtain the information and put the same in form in exhibits, schedules and reports, all of which are in evidence in the cases, supplemented by the oral testimony of each of the experts with reference to all of these things."

Earnings matter of certainty.

"6. It was conceded by the experts that the companies fairly, accurately and honestly kept their books showing the facts in these findings set forth. The experts of the state and of the companies have thereby been enabled to present with certainty and precision all the earnings within the state, both state and interstate business. But obtaining and compiling this information by the experts has been at great expense of time and money. One exception to the foregoing is to be noted as to passenger fares for a short period of time after the two cent fare law became operative."

Freight injunction consented to.

"By agreement of both sides in open court in June, 1907, this court issued a temporary writ of injunction against the enforcement of the freight rate statute."

Passenger earnings tested by experience.

"The complainants asked for a temporary injunction against the enforcement of the two cent passenger fare statute. This court held that the statute should be given a trial for five months and ascertain the result by actual operation. In preparing the order counsel, no doubt by inadvertence, fixed three months as the period for trial as to results. But by acquiescence of both sides, or if not, by delays with which the court was not chargeable, such status remained for more than one year, and the cases were not actually brought on for trial until in November, 1908. But after the statute became operative in June, 1907, and this court denied the temporary writ of injunction, the interstate passenger rates remained as they were for a period of about two months. During the time that condition prevailed parties both coming into and going out of Missouri on interstate journeys would buy tickets to the state line, thereby obtaining the benefit of the two cent fare for all distance within the state. It was not possible for the companies to show the truth as to the number of such trips, and therefore it is not possible for the court to find just how much of the earnings were on account of such interstate trips. But the extent, whatever it was, would make an erroneous showing as to state earnings, though favorable to defendants, because such earnings were of an interstate character. But even though for the short time a part of the (Rec., 5309) business was thus carried on so that additional earnings were erroneously placed to the credit of the state, still the results are not changed, for the error was against, and not in favor of, complainants."

Earnings a matter of certainty.

"Freight earnings, both state and interstate, are made up from earnings of transportation and another item called 'miscellaneous freight,' composed of switching, demurrage, and storage charges, and track and equipment rentals. Passenger earnings are made up of passenger fares and miscellaneous, the latter covering mail, express, excess baggage, storage, rentals, and possibly some other terminal earnings. No difference of consequence has arisen between the parties as to the expense of doing the entire business in the state. With rea-

sonable certainty the expenses for doing the freight and passenger, including miscellaneous of each, can be and have been separated. The earnings are known and fixed and in these findings stated to a certainty."

Method of dividing expenses in controversy.

"But as to the expenses as between state and interstate business, there has been a controversy and *such is the principal controversy in the cases.* There is no known fixed or certain rule for determining how this separation of expenses shall be made. The same cannot be made with mathematical certainty. Complainants claim that the division should be made upon the revenue basis; defendants claim that it should be made upon the ton mile basis for freight, and passenger mile basis for passengers, classifying the miscellaneous earnings as and with freight and passenger earnings respectively. By the revenue basis is meant to assign such proportion of the total expense in the state on that class of business as the earnings of that class of state business bears to all the earnings state and interstate from the same class, or, which is the same thing, ascertain what the percentage of all expenses is of all earnings, then multiply that by the state earnings of any class, and thus obtain the sum to be assigned as state expense. The ton mile basis as to freight means the assignment as state freight expenses of any class of business such proportion of all state expense as the number of ton miles of state freight bears to the total miles of all freight hauled within the state. By the passenger mile basis is meant the assignment as state passenger expenses such proportion of all passenger expenses as the number of passengers in state business carried one mile bears to the whole number of passengers state and interstate carried one mile."

Revenue basis of dividing expenses adopted.

"For reasons stated in an opinion herein filed, the revenue basis has been and is adopted as the only logical basis to use in arriving at a correct conclusion. The one basis or the other as a whole must be adopted. Either side can make

a better showing by adopting the one basis in part of the accounting, and the other basis for the other. Neither should be and is allowed to do this. As will presently appear, the state has attempted to do this in making its passenger earnings accountings."

Extra cost ascertained.

"7. Each basis for accounting has some defects, but they are minor and not controlling and do not change the result if the revenue basis is taken (Rec., 5310).

The expense of doing the state business over interstate is greater for carrying freight by at least fifty per cent, and at least twenty-five per cent for carrying passengers. Therefore this extra cost must be added to the expenses after they have been ascertained as to obtain the total expense. If the ton mile basis of division were adopted, the extra cost should also be added. This would require the use of another multiplier sufficient to bring the sum total of the state freight expense equal to that found herein, to actually represent the cost as shown by the evidence. Any apportionment of passenger expense upon the passenger mile basis would be unfair and unjust, although much more favorable to the companies than if made upon the revenue basis."

Revenue basis of division and extra cost shows a fair result as to expenses.

"8. All things considered, the evidence shows the cost of doing the different classes of state business as between state and interstate apportioned upon the revenue basis with added extra cost brings a result in these findings stated, which is fair and representative and just. The court finds, aside from the revenue basis, that the evidence shows the amount ascertained in each case as the expense and extra cost, is fair and justly represents the expense of doing each class of state business. The extra cost as to each complainant for doing the state business over interstate is more than fifty per cent in case of freight, and more than twenty-five per cent in case of passenger. This extra expense as thus found is consider-

ably in excess of these figures and the figures used are adopted as the minimum. The sum total of this extra cost if ascertained according to the ton mile theory, would not be changed because it is a question of multiplication, and one multiplier or another must be used accordingly as the theory is adopted. The findings herein made on all the evidence represent in dollars the fair cost and expense fixed at a minimum. There has also been considered and found in each case such sum as would equal the diminution of earnings upon the commodities covered by the freight rate statutes of 1905 and 1907 if the rates thus fixed had been charged, as there would have been but for the temporary injunctions herein issued."

Interest on bonds a fair charge for the roads were not over-bonded.

"9. The evidence shows that each of complainants has regularly paid for many years interest on its bonds. There is no evidence to show that any of the railroad property within the State of Missouri has an undue amount of bonds or is unfairly bonded, and the evidence does not show that any of the bonds provide for interest in any sum greater than such bonds should carry. It does show that most of the bonds are at the lowest rates of interest, and much less than the legal rate allowable in Missouri. In thus referring to interest, the St. Louis & Hannibal, and Kansas City, Clinton & Springfield companies are excepted.

Two cent fare rate did not increase travel.

"10. After the adoption of the two cent fare statute, there was no substantial increase in travel. For a few weeks there was a small increase largely brought about by interstate passengers buying (Rec., 5311) tickets to state lines, and in part by the novelty. What if any increase of travel occurred by reason of said two cent fare, would be a mere approximation. It has not been substantial, and there is no reason to believe that any such increase will be brought about in the future by a two cent fare.

Values of entire property in the state.

"11. The values of the railroad properties in the State of Missouri are found, in the cases tried, to be as follows:

	Miles	Value	Value Per Mile
St. Louis & San Francisco	1688.89	$61,238,414.70	$36,259.00
Atchison, Topeka & Santa Fe	348.31	15,091,212 00	43,326.00
Chicago, Rock Island & Pacific	515.48	19,102,507 59	37,058.00
Kansas City Southern	174.48	8,039,084.40	46,075.00
St. Louis & Hannibal	120.61	1,143,077.02	9,477.00
Missouri, Kansas & Texas	506.21	20,894,229.93	41,276.00
Chicago, Burlington & Quincy	1136.34	53,172,907.83	46,793.00
Kansas City, Clinton & Springfield	151.01	2,380,222.48	15,762.00
Chicago Great Western	84.43	3,605,236.38	42,701.00

With the exceptions hereinafter stated, the above valuations of the properties of said nine companies as fixed, are in fact practically the same as those fixed by the state assessing board for the purpose of taxation. But aside and apart from the valuations thus fixed by the state board, these findings are that upon the whole evidence said properties are at least of the values above fixed. The evidence shows that included in such sums the state board after making certain valuations under the heading of "all other property" fixed certain valuations, which when added give the totals as above. In argument it was contended that "all other property" included franchise values. This is not deemed important because it is difficult to see wherein steam railroad property like those involved, can have a franchise value. But waiving that, any franchise value that the state board could have considered, was necessarily so small a per cent of the total valuations fixed by the state board as to make no appreciable difference in the result of these cases, because if altogether admitted the remaining value is such that no road could obtain a return to which it is herein found to be entitled. But if the property has a franchise value for taxation, it also has such valuation as an earning power or, rather, upon which returns should be made. In fixing the valuations above set forth there have been considered the immense terminal values of most of the roads, the amount of stock and bonds outstanding, what it would cost to duplicate the properties both with and without terminals in the large cities, and all the evidence bearing on present values, and in fixing said valuations the sums found

are the minimum valuations, the properties being worth at least the sums thus fixed. (Rec., 5312.)

The foregoing valuations are the same as fixed by the state assessing boards except as to the property of the St. Louis & Hannibal and of the Kansas City, Clinton & Springfield in the state, which are found to be worth sixty-six and two-thirds per cent of the valuations of the state boards."

Interest on bonds.

"12. The interest obligations except as already stated are just and reasonable and should be paid in full with some dividends to the stockholders in addition. However, and entirely aside from the question of interest, the rates and earnings should in any event be such as to produce a fair return upon the valuations hereinbefore fixed."

Six per cent interest should be allowed upon assignable value.

"And such earnings should be on the property within the state as would be equivalent to six per centum per annum, that per cent being a fair return upon such valuations."

Free transportation abolished.

"13. About the same time the two cent fare statute became operative, passes and other forms of reduced and free transportation, were abolished. Since that time they have not been given nor used except in cases of employes actually employed. The passenger earnings were thereby increased, but such increase was not more than approximately one per cent."

Joint experts agree upon figures (Rec., 175-212).

"14. After the arguments were concluded at the request of the court, and *with the consent of the parties,* two experts upon each side, two selected by the railways and two by the defendants, worked with the court for something more than one week. These experts were the same gentlemen represent-

ing their respective sides who had done much of the work in preparing the cases for the respective sides for hearing. The court requested these experts to take the numerous tables and tabulate them already in evidence and to confine themselves wholly to that which had been introduced in evidence in the cases, and to make therefrom a new table for each of the nine cases showing the earnings and the expenses chargeable to each class of earnings according to the respective theories covered by counsel in the arguments. The court further requested said four experts after preparing said new tables that if they agreed, to affix their signatures thereto. This they did below a certificate reciting that the statement of earnings, operating expenses, etc., as to each particular road for the time therein given, correctly shows the results on the various assumptions set forth therein. Said nine statements were by order of this court, February 20, 1909, ordered filed and made of record in the cases. The said nine statements are now and here referred to, and are made part hereof. Each of said nine statements is found by the court to be correct upon the respective theories presented. But the theory entitled as the 'state's basis' is rejected for the reason that said statement improperly divides miscellaneous earnings, placing an undue proportion to the benefit of the state. And said basis improperly makes a division of expense upon the ton mile and passenger mile basis and does not allow a sufficient amount as extra cost of doing state business, and the same (Rec., 5313) does not allow enough for the value of the property in that it deducts all sums included 'all other property' multiplied by three."

Loss under two cent fares.

"If the companies had been permitted to charge the amounts per passenger per mile which they did charge and receive prior to the two cent passenger fare statute, they would have received in addition to that which they did receive by reason of the statute and by reason of the temporary injunction being denied for earnings within the state for a period of twelve months last preceding the submission of the

cases, the following sums: (Interstate, however, not controlled by statute, but by changed conditions):

Name of Road	State Passengers	Interstate Passengers
St. L. & S. F. R. R.	$666,008.72	$509,730.63
A. T. & S. F. R. R.	30,885.52	66,271.03
C. R. I. & P. Ry. and St. L. K. C. & C. R.	124,469.14	111,178.66
K. C. So. Ry.	7,044.49	27,260.75
St. L. & H. Ry.	37,275.38	145.23
M. K. & T. Ry.	140,593.46	63,815.12
K. C. C. & S. Ry.	14,654.57	10,846.91
C. B. & Q. R. R.	394,878.77	261,556.41
C. G. W. Ry.	49,459.47	34,621.62

Lease rentals of St. L. & S. F. R. Co.

"In the case of the St. Louis & San Francisco there were included in expenses sums paid as rentals under a lease given by the Kansas City, Fort Scott & Memphis Railway Company whose common stock is owned by it which operates the company under a lease requiring it to pay to the holders of preferred stock of the Fort Scott & Memphis Company, as a rental, a sum equal to four per cent annual dividends. This lease has been in force several years and is a fair one, and such rental has been treated as an operating expense, and is not included in fixed charges. And the court finds that it is an operating expense. But even if it were a fixed charge, it is not material as the result would not be changed even though the rentals were carried into the fixed charge account. This is so because the amounts carried into state freight expense is only $8,428.56 and interstate passenger expense, $7,443.68."

Miscellaneous earnings unfairly apportioned by state.

"15. In the statements hereinbefore referred to made and signed by the four experts, while they correctly set forth the figures on both the revenue theory and the ton and passenger mile theory, the placing of the miscellaneous earnings of the passenger business is arbitrarily fixed and does not at all proceed upon the passenger mile basis, but for that the revenue basis is taken and fixed. Such earnings are arbitrarily

divided without reference to the facts, the result being the state earnings and especially passenger, are fixed much higher than the actual earnings. Said division instead of following defendants' theory of the ton mile and passenger mile basis, is upon the revenue basis from which it is seen that this (Rec., 5314) would be a splitting of theories. But from this and from all the evidence it is plain that even the ton and passenger mile basis theory cannot be worked out without showing a loss, to prevent which an arbitrary change of account must be made as to the miscellaneous business. Even in making this arbitrary change the revenue basis is used, and yet the revenue division of expenses insisted upon by complainants is said not to be recognized. This is utterly illogical and unfair, and does not represent the true facts as to whether such earnings are made at a loss, and there is no reliance whatever to be placed in such method of accounting. In so finding no reflection whatever is made upon the experts for the state, because as before found they are men of the highest character and learning and highly skilled in accounting and with a proper basis for such accounting their work is perfect."

Rates sought to be enjoined would cause a loss.

"And from their own statements upon the basis adopted herein for making such accounting by the court, the freight business for the period mentioned would have been done at a loss if the statutory rates had been observed, and the passenger business was done at a loss under the two cent fare statute."

Rates show a deficit.

"16. As to each of the nine companies whose cases have been submitted, the earnings and expenses and all other items are different in amount. So with the returns upon value to which the company is entitled. But in no event in any of the cases tried would the freight earnings, after making the deductions herein found result in a return to any company of more than three per cent. With nearly every company an actual deficit is shown if the 1907 statute had been in force. So under the two cent fare statute a deficit as to nearly all

of the companies, and not more than two per cent in case of and company. If the freight and passenger business should be combined with the miscellaneous of each class, there would be a deficit as to some and not to exceed three per cent as to any of the others. In arriving at these conclusions and in adopting the tabulations herein set forth an account has been taken of all earnings, state and interstate, freight and passenger, and miscellaneous; the proportion which state and interstate freight and passenger exclusive of miscellaneous bear to all state and interstate, miscellaneous included, and that which they bear to all the earnings of the state; of miscellaneous freight and miscellaneous passenger earnings, undivided as between state and interstate, with the proportion they are of all earnings, freight and passenger; of all expenses divided as between all kinds of freight and passenger business, including miscellaneous, but not divided as between state and interstate; of the deductions to be made from all state freights not including miscellaneous of such proportion of expenses of all freight and passenger respectively as the freight and passenger earnings exclusive of miscellaneous bear to all earnings; of the deduction of the extra cost; of the diminution of freight earnings if the freight rate statute had been observed; of the value of that portion of the property (Rec., 5315) assignable to the particular traffic."

Assignable value, how found.

"This value is found by taking for each class of business of the entire value of the property in the state, such proportion as the earnings on that portion of the business bear to all the earnings in the state. A statement so made as to each of the companies whose cases have been submitted is as follows:

Periods are representative and were agreed to.

"17. The periods taken are representative taken by the experts upon both sides, and were for the months set forth in the column headed 'time.' These tables do not follow the form taken by the experts in preparing exhibits to be introduced in evidence, nor do they follow the prepared form adopted by

the four experts in making the nine statements hereinbefore referred to. An attempt has been made to abbreviate, but with the results the same as adopted by the experts. These are found to be correct as now to be set forth, and are adopted by the court."

Offer to correct errors if pointed out.

"If any error has crept into them, the court will make proper correction upon his attention being called thereto after these findings have been filed, which can be readily done upon motion or suggestion."

Tables of percentages upon basis of revenue.

"The tables adopted by the court now follow:

INTERSTATE FREIGHT

Company	Time Mo.	Amount	% of all Freight	% of all Earnings
St. L. & S. F. R. R.	3	$2,214,002.82	76.94	54.68
A. T. & S. F. R. R.	6	1,872,915.00	90.05	67.72
C. R. I. & P. Ry.	3	665,228.16	79.38	59.86
K. C. So. Ry.	6	702,249.91	79.35	67.11
St. L. & H. Ry.	12	51,735.05	36.25	24.61
M. K. & T. Ry.	6	1,333,455.26	81.73	57.89
C. B. & Q. R. R.	12	6,454,699.87	78.75	52.40
K. C. C. & S. Ry.	12	116,893.60	68.27	41.04
C. G. W. Ry.	6	224,169.58	86.02	57.39

STATE FREIGHT

Company	Amount	% of all Freight	% of all Earnings
St. L. & S. F. R. R.	$ 577,192.84	20.04	14.26
A. T. & S. F. R. R.	141,133.00	6.79	5.10
C. R. I. & P. Ry.	150,953,68	18.02	13.58
K. C. So. Ry.	38,748.76	4.38	3.70
St. L. & H. Ry.	87,941.99	61.62	41.84
M. K. & T. R. R.	277,416.52	17.01	12.04
C. B. & Q. R. R.	1,580,529.64	19.28	12.83
K. C. C. & S. Ry.	45,003.15	26.29	15.80
C. G. W. Ry.	29,129.36	11.18	7.45

(Rec., 5316.)

MISCELLANEOUS FREIGHT

Company	Amount	% of all Freight	% of all Earnings
St. L. & S. F. R. R.	$ 86,814.57	3.02	2.14
A. T. & S. F. R. R.	65,833.56	3.16	2.38
C. R. I. & P. Ry.	21,815.70	2.60	1.96
K. C. So. Ry.	144,046.62	16.27	13.77
St. L. & H. Ry.	3,044.11	2.13	1.45
M. K. & T. Ry.	20,603.37	1.26	0.89
C. B. & Q. Ry.	161,579.41	1.97	1.31
K. C. C. & S. Ry.	9,319.58	5.44	3.27
C. G. W. Ry.	7,280.24	2.80	1.86

INTERSTATE PASSENGER

Company	Amount	% of all Passenger	% of all Earnings
St. L. & S. F. R. R.	$ 368,687.43	31.49	9.11
A. T. & S. F. R. R.	355,318.12	51.81	12.85
C. R. I. & P. Ry.	113,524.21	41.53	10.22
K. C. So. Ry.	89,504.58	55.47	8.55
St. L. & H. Ry.	198.19	0.29	0.09
M. K. & T. R. R.	303,214.54	45.12	13.16
C. B. & Q. Ry.	1,777,788.27	43.15	14.43
K. C. C. & S. Ry.	41,145.00	36.22	14.45
C. G. W. Ry.	72,360.87	55.62	18.53

STATE PASSENGER

Company	Amount	% of all Passenger	% of all Earnings
St. L. & S. F. R. R.	$ 599,051.59	51.17	14.79
A. T. & S. F. R. R.	104,370.19	15.22	3.77
C. R. I. & P. Ry.	114,853.04	42.02	10.33
K. C. So. Ry.	31,865.28	19.75	3.05
St. L. & H. Ry.	52,667.38	78.04	25.05
M. K. & T. R. R.	246,368.53	36.66	10.70
C. B. & Q. R. R.	1,611,702.92	39.11	13.09
K. C. C. & S. Ry.	47,646.80	41.95	16.73
C. G. W. Ry.	38,105.03	29.28	9.75

MISCELLANEOUS PASSENGER

Company	Amount	% of all Passenger	% of all Earnings
St. L. & S. F. R. R.	$ 203,077.28	17.34	5.02
A. T. & S. F. R. R.	226,080.00	32.97	8.18
C. R. I. & P. Ry.	44,980.08	16.45	4.05
K. C. So. Ry.	39,973.54	24.78	3.82
St. L. & H. Ry.	14,619.99	21.67	6.96
M. K. & T. Ry.	122,458.22	18.22	5.32
C. B. & Q. R. R.	731,021.89	17.74	5.94
K. C. C. & S. Ry.	24,797.39	21.83	8.71
C. G. W. Ry.	19,643.99	15.10	5.02

(Rec., 5317.)

Percentages of expenses to earnings.

"18. ALL FREIGHT AND PASSENGER EXPENSES, INCLUDING MISCELLANEOUS, LESS TAXES AND RENTALS, AND PERCENTAGES TO EARNINGS, UNDIVIDED AS BETWEEN STATE AND INTERSTATE.

Company	Freight	Passenger	Taxes and Rentals, Freight	Taxes and Rentals, Passenger
St. L. & S. F. R.	1,802,813.26	974,816.61	112,452.04	38,979.63
A. T. & S. F.	1,382,738.65	572,167.20	32,361.50	10,854.04
C. R. I. & P.	619,199.73	317,633.62	74,227.43	21,015.44
K. C. So.	571,297.54	141,432.56	22,331.70	3,737.37
St. L. & H.	117,908.81	68,343.04	5,994.07	2,273.61
M. K. & T.	1,010,643.65	516,589.98	119,017.87	58,465.49
C. B. & Q.	6,793,610.60	3,527,311.81	12,235.30 Cr.	6,152.58 Cr.
K. C. C. & S.	98,988.29	138,384.77	9,182.36	5,749.38
C. G. W.	198,887.69	126,355.88	12,294.18	11,312.16

Company	% of said expenses to earnings exclusive of taxes and rentals		Same, taxes and rentals		Dif.
	Freight	Passenger	Freight	Passenger	
St. L. & S. F. R. R.	62.64	83.26	3.91	3.33	
A. T. & S. F. R. R.	66.48	83.43	1.55	1.58	.19
C. R. I. & P. Ry.	73.89	116.20	8.73	7.68	.43
K. C. So. Ry.	64.55	87.66	2.52	2.31	.13
St. L. & H. Ry.	82.61	101.27	4.19	3.37	.19
M. K. & T. Ry.	61.95	76.87	7.29	8.69	.15
C. B. & Q. Ry.	82.88	85.60	0.00	0.00	
K. C. C. & S. Ry.	57.81	121.83	5.36	5.06	.64
C. G. W. Ry.	76.33	97.11	4.71	8.68	.21

The time of the foregoing tables is the same as in first table above.

Final results.

"19. The following nine tables show the state earnings and expenses, valuation, return on value, and interest charge of the said nine roads respectively whose cases have been submitted. The other cases are to be covered by decrees by agreement the same as certain decrees of the nine cases, all of which is of record. (Rec., 5318.)

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

Period, Three Months.

State earnings and expenses	Freight		Passenger	
State earnings	577,192.84		599,051.59	
State expenses	361,644.33		498,716.20	
Leaving	215,548.51		100,335.39	
Less taxes and rentals	22,760.29		20,097.90	
Leaving	192,788.22		80,237.49	
Extra cost of doing state business, freight 50%, passenger 25%	131,425.08		53,907.36	
Leaving	61,363.14		26,330.13	
Diminution in earnings if the state rates in question had been charged	11,389.27			
Leaving	49,973.87		26,330.13	
VALUATION		14.26%		14.79%
Assignable proportion of value for representative period, and 6% interest thereon, is	130,988.97		135,857.42	
RETURN ON VALUE				
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is		2.29%		1.16%
(b) Same without allowance for extra cost		8.3%		3.54%
INTEREST CHARGE				
Actual interest charge paid on assignable properties	116,792.45		121,133.27	

(Rec. 5319.)

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY.

Period, Six months.

State earnings and expenses	Freight	Passenger
State earnings	141,133.00	104,370.19
State expenses	92,581.89	87,834.09
Leaving	48,551.11	16,536.10
Less taxes and rentals	3,503.41	901.74
Leaving	45,047.70	15,634.36
Extra cost of doing state business, freight 50%, passenger 25%	41,859.55	17,947.71
Leaving	3,188.15	2,313.35 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged	13,885.87	
Leaving	10,697.72 (Red Ink) (Deficit)	2,313.35 (Red Ink) (Deficit)
VALUATION		
Assignable proportion of value for representative period, and 6% interest thereon	5.10% 23,089.35	3.77% 17,068.16
RETURN ON VALUE		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	Nothing	Nothing
(b) Same without allowance for extra cost	8.09%	5.49%
INTEREST CHARGE		
Actual interest charge paid on assignable properties	17,934.56	13,257.51

(Rec. 5320.)

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Period, Three Months.

State earnings and expenses	Freight	Passenger
State earnings	150,953.68	114,853.04
State expenses	111,579.80	133,469.65
Leaving	39,373.88	18,616.61 (Red Ink) (Deficit)
Less taxes and rentals	13,375.78	8,830.68
Leaving	25,998.10	27,447.29 (Red Ink) (Deficit)
Extra cost of doing state business, freight 50%, passenger 25%	41,919.82	17,501.61
Leaving	15,921.72 (Red Ink) (Deficit)	44,948.90 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged	9,989.43	
Leaving	25,911.15 (Red Ink) (Deficit)	44,948.90 (Red Ink) (Deficit)
VALUATION		
Assignable proportion of value for representative perior and 6% interest thereon	13.58% 38,911.81	10.33% 29,599.34
RETURN ON VALUE		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	Nothing	Nothing
(b) Same without allowance for extra cost	2.04%	Nothing
INTEREST CHARGE		
Actual interest charge paid on assignable properties	24,907.02	18,946.21

(Rec. 5321.)

THE KANSAS CITY SOUTHERN RAILWAY COMPANY.

Period, Six Months.

State earnings and expenses	Freight		Passenger	
State earnings	38,748.76		31,865.28	
State expenses	25,022.83		27,932.93	
Leaving	13,725.93		3,932.35	
Less taxes and rentals	978.13		738.13	
Leaving	12,747.80		3,194.22	
Extra cost of doing state business, freight 50%, passenger 25%	11,711.60		5,346.15	
Leaving	1,036.20		2,151.95	(Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged	2,957.58			
Leaving	1,921.38	(Red Ink) (Deficit)	2,151.93	(Red Ink) (Deficit)
VALUATION				
Assignable proportion of value for representative period and 6% interest thereon	3.70% 8,923.38		3.05% 7,355.76	
RETURN ON VALUE				
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	Nothing		Nothing	
(b) Same without allowance for extra cost	6.58%		2.6%	
INTEREST CHARGE				
Actual interest charge paid on assignable properties	5,295.38		4,365.11	

(Rec. 5322.)

THE ST. LOUIS & HANNIBAL RAILWAY COMPANY.

Period, Twelve Months.

State earnings and expenses	Freight	Passenger
State earnings	87,941.99	52,667.38
State expenses	72,655.40	53,334.91
Leaving	15,286.59	667.53 (Red Ink) (Deficit)
Less taxes and rentals	3,693.55	1,774.32
Leaving	11,593.04	2,441.85 (Red Ink) (Deficit)
Extra cost of doing state business, freight 50%, passenger 25%	12,026.69	2,444.68
Leaving	433.65 (Red Ink) (Deficit)	4,886.53 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged	15,126.02	
Leaving	15,559.67 (Red Ink) (Deficit)	4,886.53 (Red Ink) (Deficit)
VALUATION		
Assignable proportion of value for representative period and 6% interest thereon	41.84% 28,694.05	25.05% 17,179.40
RETURN ON VALUE		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	Nothing	Nothing
(b) Same without allowance for extra cost	Nothing	Nothing
INTEREST CHARGE		
Actual interest charge paid on assignable property	16,359.44	9,794.55

(Rec. 5323.)

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Period, Six Months.

State earnings and expenses	Freight	Passenger
State earnings	277,416.52	246,368.53
State expenses	171,910.48	189,381.89
Leaving	105,506.04	56,986.64
Less taxes and rentals	20,244.94	21,433.45
Leaving	85,261.10	35,553.19
Extra cost of doing state business, freight 50%, passenger 25%	66,590.77	27,482.59
Leaving	18,679.33	8,070.60
Diminution in earnings if the state rates in question had been charged	20,222.85	
Leaving	1,552.52 (Red Ink) (Deficit)	8,070.60
VALUATION		
Assignable proportion of value for representative period and 6% interest thereon	13.04% / 75,469.96	10.70% / 67,070.48
RETURN ON VALUE		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	Nothing	0.72%
(b) Same without allowance for extra cost	5.18%	3.18%
INTEREST CHARGE		
Actual interest charge paid on assignable property	62,439.68	55,490.41

(Rec. 5324.)

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

Period, Twelve Months.

State earnings and expenses	Freight	Passenger
State earnings	1,580,529.64	1,611,702.92
State expenses	1,324,453.83	1,489,746.71
Leaving	256,075.81	121,956.21
Less taxes and rentals	2,487.99 Cr.	2,798.50 Cr.
Leaving	258,563.80	124,754.71
Extra cost of doing state business, freight 50%, passenger 25%	484,129.29	158,205.70
Leaving	225,565.49 (Red Ink) (Deficit)	33,450.99 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged	112,533.71	
Leaving	338,099.20 (Red Ink) (Deficit)	33,450.99 (Red Ink) (Deficit)
VALUATION		
Assignable proportion of value for representative period and 6% interest thereon	12.83% 409,325.04	13.09% 417,620.02
RETURN ON VALUE		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	Nothing	Nothing
(b) Same without allowance for extra cost	1.79%	2.11%
INTEREST CHARGE		
Actual interest charge paid on assignable property	132,735.02	135,424.89

(Rec. 5325.)

KANSAS CITY, CLINTON & SPRINGFIELD RAILROAD COMPANY.

For Period of Twelve Months.

State earnings and expenses	Freight	Passenger
State earnings	45,003.15	47,646.80
State expenses	26,024.02	58,052.41
Leaving	18,979.13	10,405.61 (Red Ink) (Deficit)
Less taxes and rentals	2,414.04	2,411.86
Leaving	16,565.09	12,817.47 (Red Ink) (Deficit)
Extra cost of doing state business, freight 50%, passenger 25%	8,483.30	4,760.44
Leaving	8,081.79	17,577.91 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged	2,970.21	
Leaving	5,111.58	17,577.91 (Red Ink) (Deficit)
VALUATION		
Assignable proportion of value for representative period and 6% interest thereon	15.80% 22,564.51	16.73% 23,892.67
RETURN ON VALUE		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	1.36%	Nothing
(b) Same without allowance for extra cost	3.61%	Nothing
INTEREST CHARGE		
Actual interest charge paid on assignable property	23,881.78	25,287.48

(Rec. 5326.)

CHICAGO GREAT WESTERN RAILWAY COMPANY.

Period, Six Months.

State earnings and expenses	Freight	Passenger
State earnings	29,129.36	38,105.03
State expenses	22,235.64	36,996.98
Leaving	6,893.72	1,108.05
Less taxes and rentals	1,374.49	3,312.25
Leaving	5,519.23	2,204.20 (Red Ink) (Deficit)
Extra cost of doing state business, freight 50%, passenger 25%	9,347.72	6,090.35
Leaving	3,828.49 (Red Ink) (Deficit)	8,294.55 (Red Ink) (Deficit)
Diminution in earnings if the state rates in question had been charged	1,893.41	
Leaving	5,721.90 (Red Ink) (Deficit)	8,294.55 (Red Ink) (Deficit)
VALUATION		
Assignable proportion of value for representative period and 6% interest thereon	7.45% 8,057.70	9.75% 10,545.32
RETURN ON VALUE		
(a) Actual return upon the assignable value found in subdivision above, the amount shown in first subdivision above is	Nothing	Nothing
(b) Same without allowance for extra cost	2.69%	Nothing
INTEREST CHARGE		
Actual interest charge paid on assignable property	7,164.08	9,373.81

(Rec. 5327.)

Errors or mistakes will be remedied if either party calls attention thereto.

"20. The court believes that the foregoing findings are all that are material and all that are necessary to make. However, if any party believes that any material finding of fact has been omitted, upon application of such party the same will be considered and made if deemed advisable. And likewise if any of the foregoing computations or figures have been erroneously made. But such application to be entertained must be made within thirty days from this date.

And each, all and every of the foregoing are made as the findings of the court, and are now and here in open court this March 8th, 1909, ordered filed and made of record in said cases and all of them."

BRIEF OF ARGUMENT FOR RAILROADS.

I.

Laws under which the rates were sought to be enjoined and the questions arising in reference thereto.

1. Laws Prior to 1905.

The general laws of Missouri (Rev. Sts., 1899, Art 4, chap. 12) as amended (Laws Mo., 1903, p. 132. Rec., 5-6), hereinafter set forth as Appendix 1, gave the Railroad Commissioners full power to fix, modify and reduce all state freight railroad rates. All rates in existence thereafter were prior to 1905 in existence and established by the acquiescence or orders of the Commissioners.

2. Freight Act of 1905 Challenged by the Original Bills as Illegal and Confiscatory.

(a) In 1905, there was adopted a maximum state freight carload rate act (Laws, Mo., 1905, p. 102, Rec., 6-7) hereinafter set forth as Appendix 2.

(b) Not only the penalty clause, but the whole act, was, regardless of its being confiscatory, clearly void because it only applied the penalty (Sec. 1194a) to a "railroad company," whereas the rates fixed (Sec. 1194) applied to any "individual, company

or corporation owning, operating or managing a railroad." This was such a clear discrimination as to destroy the act. In *L. & N. R. Co.* v. *R. Com.*, 19 Fed. Rep., 679, 695, the same question was presented, and Judge Baxter said:

> "Another and like invidious discrimination is contained in section 13. This section makes it the duty of the commissioners to 'consider and carefully revise all the tariffs of charges for transportation of any person or corporation owning or operating a railroad in this state,' and if, in their judgment, 'any such charge is more than just and reasonable compensation for the service for which it is proposed to be made, or if any such charge amounts to unjust and unreasonable discrimination against any person, locality or corporation,' the commissioners are to 'notify the person or corporation of the changes necessary to reduce the rate to a just and reasonable compensation, and to avoid an unjust and unreasonable discrimination;' and 'when such changes are made' or 'when none are deemed proper and expedient, the commissioners are to append a certificate of approval to such tariff of charges, and in case such change' suggested by the commission 'shall not be made,' or if 'any charge, subsequently made, shall not conform thereto,' said '*corporation* shall be held *prima facie* guilty of extortion.' It is *corporations*, and not persons operating railroads, who are to be held *prima facie* guilty of extortion under this section, and it is corporations, and corporations *only*, who can be punished under its provisions, and thus it appears the act is, in its severest features, more exacting and oppressive of corporations than of persons operating railroads, the former being subjected to penalties and to punishment from which the latter are exempt."

Below, upon the first hearing, in an opinion a copy of which appears as Appendix 8, Judge Philips said:

> "For instance, right on the face of this act of the legislature there is a question raised here that the act is leveled against all individuals and corporations who may carry these articles affected by this act. When it comes to the section of the statute that authorizes the shipper to maintain an action and treble damages, it applies only to railroad companies and

not to individuals who may be running a railroad, and therefore the contention is that on the face of the statute it is discriminatory. It discriminates against the railroad company in this respect by subjecting it to this liability when it does not subject an individual who may own a railroad and be carrying goods as a railroad to the same liability. Now there are two answers made to that in argument. One is that the bill does not aver on its face that there are individuals who are operating railroads in the state and who would be common carriers; and in the second place, that although the section of the statute referred to which subjects the railroads to treble damages at the suit of any shipper applies only to railroad companies, that it is not infrequently the case that an act or a statute may be void in part and good in part, that the vicious part of it may be eliminated and that which is good may stand. It seems to me that if this objection to the statute is well taken, that that section discriminates against the railroad company and in favor of an individual carrier. The principle or rule invoked about the statute being good in part and bad in part does not apply to this sort of a case. The objection to this statute is that it discriminates. It subjects only one class of citizens to a liability and to a penalty without subjecting another citizen engaged in the same line of business and doing the same acts to the same sort of penalty, and therefore it is a discrimination on its face against one citizen and in favor of another, and all such statutes certainly run counter to the provisions of the fourteenth amendment because they are unequal in their provisions. Whether the facts that have been developed that there are no individuals in this state running railroads or performing the functions of a common carrier in this state, would have any effect on that statute is not necessary to be considered now, but as stated by the court at the hearing, it would seem to me that for the purpose of this preliminary hearing, the legislature which made the statute having mentioned individuals, the presumption ought to be directed to the legislative declaration that there are such individuals subject to the provisions of the statute, otherwise they would not have been enumerated by the legislature. If it is a legislative declaration that there was an interest to legislate with respect to individuals operating railroads who then owned them or who might hereafter operate railroads, it is not necessary to go further into a discussion of that matter."

(c) The act of 1905 was, however, repealed by that of 1907 (Laws, Mo., p. 171; Amended Bill, Rec., 64-66), hereinafter set out as Appendix 3. The judge below (Opinion, Rec., 5286) said:

> "In 1907 the legislature of the state repealed the statute of 1905 and enacted a substitute therefor, which act was to take effect in June, 1907."

It was, however, claimed below by the state that under the act, penalties accruing thereunder remained in force because section 1194b thereof provided that no penalties accrued or liabilities created should be affected by the repeal. This carried out the suggestion of the Attorney General (Appendix 9) that the new law "would not affect the litigation now pending." However this might be, the enforcement of penalties was enjoined at a time when the confiscatory nature of the rate was not denied, so no penalties could accrue when there was an injunction against the enforcement of the rates to enforce which the penalties were imposed. Any other view would nullify the doctrine of *Ex Parte Young*, 209 U. S., 123, 52 L. Ed., 714, and *Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 53 L. Ed., 382. The result is, therefore, that the entire act of 1905 is repealed and defendants were wrong in insisting upon the right to enforce its penalties (*Dinsmore* v. *Southern Express Co.*, 183 U. S., 115, 120, 121, 46 L. Ed., 111). Whether or not technically there was a full and complete repeal of every part of the act of 1905, the legislature of 1907 did, in view of the pending litigation, effectually determine the case for the railroads accomplishing "the result they wished." So it has been here expressly decided (*Dinsmore* v. *Express Co.*, 183 U. S., 115, 121, 46 L. Ed., 111, 113).

(d) It was conceded below (Ev. Sturgis, Rec., 4746; Taliaferro, Rec., 4409, 4566; Peabody, Rec., 4409), that if the freight

rates fixed by the act of 1907 were confiscatory, then those fixed by the act of 1905 must fail because the latter were lower. The trial judge (Rec., 5308, Finding 4), as to the express concession (Rec., 4409) at the trial, said:

> "The freight rate statute of 1907 as to commodities mentioned allowed greater rates than did the statute of 1905 assailed by the original bills of complaint herein, *and it was conceded at the trial* that if the rates fixed by the act of 1907 were confiscatory, that those fixed by the act of 1905 were likewise."

The decree (Rec., 5246-5247) found the rates fixed by the act to be in fact confiscatory, and they necessarily were if those fixed by the act of 1907 were so.

(e) The act of 1905 was also void for the reasons asserted by the cross appeal to be hereafter presented, i. e., because it directly affected interstate commerce, and because being confessedly confiscatory as to some of the roads, it would be discriminatory to uphold it as to the others. These questions will hereafter be considered in connection with the acts of 1907.

(f) The Governor, when he reluctantly approved (Rec., 2450-2451) the act of 1905, practically admitted that it was passed without investigation and invited a legal test of the rates by saying:

> "That there should be a re-adjustment of freight rates in this state there can be no question. It is a matter that must be fought out sooner or later. This measure is at least a step in the direction of the solution of the question for the courts can, if the contention that the rates are unreasonable is insisted upon, *after hearing all the evidence and examining into all the facts that are not available, to the executive, decide upon the reasonableness of the rates, the result of which proceedings would be that the public would be advised as to what rates are reasonable,* and the Railroad Commissioners or the next General Assembly can equalize such inequalities

of this measure as may be found to exist, if any, and fix such rates as under the law, *announced by the courts,* are right and just to the railroads and to the people."

It was thus upon this invitation that the original proceedings were instituted and an injunction granted, the state declining to preliminary contest the facts. (Rec., 16, 19; *supra* Div. 3).

In his general message in 1907 (Rec., 2450) the Governor thus urged an amendment to the act of 1905:

"The Forty-third General Assembly enacted a maximum freight law reducing freight rates on all railroads of the state. The federal courts have enjoined the Railroad Commissioners and state officials from enforcing this law until its validity can be determined. The case is now pending in the United States Court at Kansas City. Much testimony has been taken in the case, and I have requested the Attorney General to prepare for your information the salient features developed by the evidence, in order that you may be fully advised in the premises. In my opinion the present law should be amended so as to make the penalty for its violation apply to persons, corporations and partnerships. The present penalty clause applies only to railroads. It should also be amended so as to include coal, lumber and other products."

Afterwards he sent a special message (Rec., 2449-2450) somewhat receding from his position taken and invitation extended in 1905 and inferentially criticizing the court below, but urging changes in the old law by saying:

"The Forty-third General Assembly enacted a maximum freight law, reducing freight rates on the railroads in this state. There can be no doubt that freight rates in this state are entirely too high as compared with states similarly situated. No maximum rate law had been enacted for many years, and it is but natural that in the endeavor to fix rates upon a reasonable basis some inaccuracies should have crept in. *Taking advantage of the seeming defects of this measure,*

the railroads have enjoined through the federal courts the Railroad Commissioners and the state officials from enforcing this law until its validity can be determined. This case is now pending in the United States District Court at Kansas City. It would be unfortunate if this General Assembly should adjourn without enacting a statute curing the faults in this freight rate law. The people of the state are entitled to and should receive the benefit of the reduced freight rates which they have not yet had the advantage of by reason of this statute being inoperative through the courts. The statute enacted by the last General Assembly is defective in the penalty clause, which applies only to railroads. The penalty should be made to apply to persons, corporations and partnerships. The cattle clause should be corrected in the light of the testimony adduced in the freight rate litigation so as to fix these rates at an amount that will stand the test of the judicial crucible. With these corrections I believe the people of Missouri will soon be enjoying the reduction of freight rates given by the law and of which they are now deprived."

It is scarcely conceivable under these circumstances that the act of 1905 has any validity. It surely has answered its purpose (*Dinsmore* v. *Express Co.*, 183 U. S., 115, 46 L. Ed., 111). A letter of the Attorney General to the Governor, transmitted by the latter to the legislature, and submitted herewith as Appendix 9, was equally insistent upon a repeal, but at the same time that officer unjustly insisted that the pending litigation as to the old act would be continued, and upon this subject, said:

"It is, therefore, my opinion that there should be adopted by this legislature a *new* maximum freight rate law which would make such changes in the live stock rate of the act of 1905, as would relieve the bill from any question of legality on account of the low rate upon live stock fixed by the act of 1905; that the penalty clause of the bill should be changed; that maximum rate should be established upon the articles enumerated in Class J., and that such modifications should be made in the rates fixed by the act of 1905, upon those commodities, other than live stock, which might in the

opinion of the legislature, assisted by the experts employed by the state in this litigation, seem advisable. *The enactment of a law making these changes in the act of* 1905, *would not affect the litigation now pending*, unless the railroad companies would by reason of such new enactment decide to abandon the litigation."

It is therefore submitted that the act of 1905 cannot, under any circumstances, be enforced.

3. Freight Acts of 1907.

(a) So urged by the Attorney General and Governor, the legislature of 1907, passed (Laws Mo., 1907, p. 171; Amended Bill, Rec., 64-66) an act, a copy of which is attached hereto as Appendix 3. Stone was added, that having been provided for at a lower rate in 1905 by a separate act (Laws Mo., 1905, p. 104, Rec., 62). This new act raised the rates upon live stock which was mainly carried by the C. B. & Q., in the case of which company the evidence had been taken before the Master. It, however, left the remaining rates unchanged other than a decrease of the rates as to commodities like coal, ore, stone and timber commonly carried by the lines in other parts of the state. A comparison of the two laws so shows. Thus, under the laws of 1907, the live stock rate was raised from $6 to $8 per carload for the first 25 miles, and from $3 to $4 per carload for the second 25 miles; the stone and the other like commodity rates were reduced from 20 cents per ton per car for the second ten miles and 5 cents per ton for each additional ten miles, as fixed by the act of 1905 (Laws Mo., 1905, p. 104, Rec., 62), to 5 cents per ton per carload each ten miles over the first ten. At the same time an act was passed fixing the rates upon carloads of fruit

(Laws Mo., 1907, p. 187, Rec., 66-67) a copy of which is attached hereto as Appendix 4. Still another act (Laws Mo., 1907, Rec., 67) hereafter copied as Appendix 5 hereto, was passed requiring the shippers of all carload lots to be carried free. This latter act needs no special consideration, as the state court has since declared it void (*McCully* v. *R. Co.*, 212 Mo., 1) because it required the railroad to render a service without compensation.

(b) Upon the C. B. & Q. alone, the annual reduction of state freight earnings under the act of 1905 was (Rec., 238) $171,-122.07. Under the act of 1907, the reduction, exclusive of that upon fruits and stone, was (Finding 19, Rec., 5324; Ev. Sturgis, Rec., 4746, 5098) at least $112,533.71. As the state rate necessarily fixed the interstate (Finding 3, Rec., 5306-5307) the annual reduction in the interstate earnings from the same commodities was enormous, aggregating (Ev. Sturgis, Rec., 4746, 5098, Exhibit 101) $477,647.79 under the act of 1907, and $700,487.29 under the act of 1905. Upon all the roads whose cases were tried, the reduction in state freight rates aggregated $294,044.07 (Statement *supra*, Div. 7, subd. a) and the reduction upon the interstate was very much larger, at least three times as much.

The acts of 1907 in conjunction with that of 1905 became the subject of amended and supplemental bills (Rec., 61-73, Statement, *supra*, Div. 8) as the state, when asking for the legislation, necessarily conceded and insisted must be the case, for the Attorney General's report, submitted by the Governor (Appendix 9), said:

> "The enactment of a law making these changes in the act of 1905, *would not affect the legislation now pending*, unless the railroad companies would by reason of such new enactment decide to abandon the litigation."

The state freight rates actually received from the commodities in question were (Request 23, Rec., 102-166) for the test periods

for the St. L. & S. F. 10.94 per cent of all state freight earnings; for the A. T. & S. F., 33.4 per cent; C. R. I. & P., 7.24 per cent; K. C. S., 36.17 per cent; St. L. & H., 33 per cent; M. K. & T., 33 per cent; C. B. & Q., 31.92 per cent; K. C. C. & S., 31.92 per cent; and by the C. G. W., 57.81 per cent. The percentage thereof lost by the reduction and diminution in these rates was great, being in excess of 20 per cent, with the St. L. & S. F., 29 per cent with the A. T. & S. F., 22 per cent with the C. B. & Q., and 38 per cent with the St. L. & H. The freight rates in Missouri were necessarily low because (Statement, Div. 7, subd. b) the short distance between the rivers compelled the roads to carry upon a mileage rate for 200 miles at an expense of running 300. Any further reduction was a serious matter.

(c) The act of 1907 was drastic in its penal provisions for section 1194a provided for a fixed fine of $5,000. A failure to pay same resulted in imprisonment because the general law (Rev. Sts., Mo., 1899, Sec. 2680) provided:

> "Whenever any defendant shall, on a conviction, be sentenced to imprisonment in a county jail, or to pay a fine, he shall be imprisoned until the sentence is fully complied with and all costs paid unless he be sooner discharged in the manner hereinafter provided."

If two freight trains of twenty cars each ran each day, the daily fines would aggregate $200,000, or $73,000,000 per year, more than the value of the entire property of any company in the state (Finding 11, Rec., 5311). It is not strange then that the temporary injunction as to this act was issued *by consent*, as in finding 6 (Rec., 5308) thus recited:

> "By *agreement of both sides* in open court in June, 1907, this court issued a temporary writ of injunction against the enforcement of the freight rate statute."

In the supplemental opinion (Rec., 5239; 168 Fed. Rep. 359) it was said:

> "Upon a hearing, *by agreement of counsel on both sides,* a temporary injunction was issued against the enforcement of the freight rate statute."

This admission practically conceded that the freight rates were confiscatory. The order so consented to (Rec., 61) permitted the injunction without other security than the original nominal bond (Rec., 19) without surety. The same orders were entered in each of the other seventeen cases. (Nos. 672, 673, pp. 23, 79; Nos. 674, 675, pp. 20, 65; Nos. 676, 677, pp. 19, 73; Nos. 678, 679, pp. 21, 63; Nos. 680, 681, pp. 20, 63; Nos. 682, 683, pp. 19, 70; Nos. 684, 685, pp. 20, 55; Nos. 686, 687, pp. 39, 91; Nos. 688, 689, pp. 38, 104; Nos. 690, 691, pp. 33, 93; Nos. 692, 693, pp. 21, 79; Nos. 694, 695, pp. 20, 62; Nos. 696, 697, pp. 19, 67; Nos. 698, 699, pp. 20, 54; Nos. 700, 701, pp. 19, 73; Nos. 702, 703, pp. 18, 66; Nos. 704, 705, pp. 20, 60.)

(d) The court below upon the facts found the rates fixed by these acts to be confiscatory (Decree, C. B. & Q., case, Rec., 5241; decrees in all other cases Statement Div. 22). This, too, after giving the state the benefit of all the other state freight rates, as has always been contended it was entitled to under *M. & St. L. R. Co.* v. *Minnesota,* 186 U. S., 257, 267, 46 L. Ed., 1151, 1157. That this was to the advantage of the state was recently decided by Judge Hook (*M. K. & T. R. Co.* v. *Love,* 177 Fed. Rep., 493, 502, 503) he saying:

> "It is also urged that the bills of complaint are defective because they do not assail the freight rates separately. But the bills disclose the contrary, at least by express general allegations. Moreover, the rates in question should properly be considered as a body and in connection with the other

freight rates of the companies not affected by the orders. Though the orders, save three modifications were made successively at different times during the year 1908, the rates prescribed constitute as much a single body as if embraced in one order. They affect from forty to fifty per cent of the local freight business, and cause an average reduction of about forty per cent of the prior rates applied to the same amount of traffic. Presumably the commission preserved a due relation among them so far as is practicable in such cases, and there is no contention that the rates left untouched are relatively as low. When all the local freight earnings are considered an insufficient net return is clearly disclosed, and there is no difficulty in locating the cause."

A like view was also expressed by Judge Sanborn upon appeal (*Love* v. *A. T. & S. F. R. Co.*, 185 Fed. Rep., 321, 327, 328, 107 C. C. A., 403). This court twice refused certiorari in the Oklahoma case (218 U. S., 675; 220 U. S., 618).

It is immaterial whether gains or losses were or might have been made upon the interstate or the business other than that of the general class upon which the rates in question were fixed (*Smyth* v. *Ames*, 169 U. S., 517, 541, 42 L. Ed., 819, 847; *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep., 342). That view was taken below (Opinion, Rec., 5301-5302). However, if all state business be considered, there is, as hereafter shown, not a sufficient return in Missouri to any railroad therein. Of course, if the rates are confiscatory the enforcement thereof was properly enjoined. Such is now the settled law. (*Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819; *Ex parte Young*, 209 U. S., 123, 52 L. Ed., 714; *Hunter* v. *Wood*, 209 U. S., 205, 52 L. Ed., 747; *Prentis* v. *Atlantic Coast Line*, 211 U. S., 210, 53 L. Ed., 150; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 53 L. Ed., 382; *A. T. & S. F. R. Co.* v. *Love*, 174 Fed. Rep., 591; *M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493; upon appeal, 185 Fed. Rep., 321; certiorari denied, 218 U. S., 675; 220 U. S., 618.) The question of confiscation will hereafter be considered.

(e) Upon the cross appeals it is contended that the acts of 1907 must fall, because they directly affect interstate commerce, and because being confessedly confiscatory as to most of the roads, they cannot be upheld as to the remainder. It will also be contended that all the costs should have been taxed to the state officers. These questions will be hereafter considered.

4. THE PASSENGER ACT OF 1907.

(a) Prior to 1907 the statute as to passenger fares (Rev. Sts., Mo., 1899, Secs. 1191, 1192), copied as Appendix 6 attached hereto, fixed three cents as the rate.

(b) In 1907, a two cent passenger rate law, copied as Appendix 7 hereto, was passed (Laws Mo., 1907, p. 170; Amended Bill, Rec., 69-70). This and the freight acts took effect upon the same day (Bill, Rec., 63, 66, 69; Answers, Rec., 96, 97, 103, 104; Const. Art. 4, Sec. 36) and were made the subject of the new, amended and supplemental bills. The actual yearly reductions thereby of the state passenger earnings (Finding 14, Rec., 5313) were enormous. In the cases tried they aggregated $1,465,269.52. The act forced a reduction of the interstate fares, causing (id.) the large yearly loss therein (id.) of $1,085,426.30. So while the freight act of 1907 increased the state earnings slightly over the 1905 act, yet this was much more than overcome by the state passenger reduction alone. Moreover there was a net loss of $294,064.07 in state freight revenue to the carriers whose cases were actually tried (Finding 19, Rec., 5318-5326). This was irrespective of the enormous reductions in interstate rates. These reductions were in about the proportions of the percentages shown (Finding 17, Rec., 5315) as to state and interstate earnings generally. The court below refused (Finding 6, Rec., 5300) a tempor-

ary injunction as to the passenger rate pending a test and so kept that rate in force about two years. The penalty provision was quite severe, section 1192a providing for a maximum fine of $500 and a minimum of $100. The C. B. & Q. alone in one year carried (Ev. Eustis, Rec., 4376) 2,695,898 state passengers. Minimum fines of $100 would have aggregated in one year $269,589,800, several times the value of all the property of that company within the state. The C. R. I. & P. (Cases Nos. 678-81) in three months (Rec., 5034) carried 169,031 state passengers; the K. C. S. in twelve months (Rec., 5055) 1,557,058; the M. K. & T. (Rec., 5071) 422,880 in six months. Minimum fines in any of these instances would in one year have confiscated the assignable portion (Finding 17, Rec., 5315-5316) as well as the total value of these roads (Finding 11, Rec., 5311) in the state. After the decision of *Ex parte Young*, 209 U. S., 123, 52 L. Ed., 714, it became plain that there should have been a temporary injunction. Before that the fear of penalties would have prevented a violation of the statute.

(c) The trial court upon all the evidence at final hearing, found the rate to be clearly confiscatory. This, of course, entitled complainant to be relieved therefrom by injunction. (*Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819; *Ex parte Young*, 209 U. S., 123, 52 L. Ed., 714; *Hunter* v. *Wood*, 209 U. S., 205, 52 L. Ed., 747; *Prentis* v. *Atlantic Coast Line*, 211 U. S., 210, 53 L. Ed., 150; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 53 L. Ed., 382; *A. T. & S. F. R. Co.* v. *Love*, 174 Fed. Rep., 59; *M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493; upon appeal, 185 Fed. Rep., 321; 218 U. S., 675; 220 U. S., 618). That phase of the case will be hereafter considered. Such a result was foreshadowed by Mr. Justice Hughes, when as Governor of New York, he vetoed a two cent fare law. This veto message hereafter appears as appendix 10. It is an unanswerable argument

against the enforcement of the state laws here involved promulgated, as they were, without investigation, and without any knowledge of the facts.

The Pennsylvania (*Pennsylvania R. Co.* v. *Philadelphia Co.*, 220 Pa., 100, 68 Atl. Rep., 676; *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep., 342), Arkansas (*In re Arkansas Rates*, 163 Fed. Rep., 141, 187 Fed. Rep., 290), Oklahoma (*A. T. & S. F. R. Co.* v. *Love*, 174 Fed. Rep., 591; 177 Fed. Rep., 493, 185 Fed. Rep., 321, 107 C. C. A., 403; 218 U. S., 675; 220 U. S., 618) and Minnesota (*Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep., 765), two cent fare laws have been enjoined. That rate was condemned by the Wisconsin Railroad Commission (*Buell* v. *C. M. & St. P. R. Co.*, February, 1907). There ought not, therefore, to be any doubt about a similar rate in another western state. However, upon the proofs and findings there is not a shadow of a doubt, not even a basis for an argument in favor of the rate. This will however, be the subject of subsequent detailed consideration.

(d) Upon the cross appeal the validity of the passenger rate is also assailed, because the act of fixing it directly affects interstate rates, and being confessedly invalid as to most of the roads, it cannot without discrimination be applied to the rest. Besides this, its non-application to roads 45 miles or less long makes it discriminatory. These questions will be hereafter considered.

(e) In view of the history of the legislation of 1907, the state freight and passenger acts may well be considered as a whole. The freight rates were slightly increased over those of 1905, already challenged by litigation, while the passenger fares were cut thirty-three and one-third per cent. The court below found each act to be confiscatory. The state to obtain non-confis-

catory results combines the two. In no other way can even an argument to that end be made on its behalf. The course pursued at the final hearing of the Arkansas case (*In re Arkansas Rates*, 187 Fed. Rep., 290), was to consider the rates as a whole. Upon such a combination, however, the revenue division of expense being adopted, without any extra cost, the rates are confiscatory as to every road except the A. T. & S. F. (Cases Nos. 674-5). As to that road the combined earnings, freight and passenger, for six months exceeded (Finding 19, Rec., 5319) six per cent upon the assignable value only by $6,638.48. But the extra cost upon freight for the same period estimated upon the minimum revenue basis of 50 per cent, was $41,859.55, and 25 per cent for passenger, was $10,907.12. Upon the state's basis (id. Report of experts, Rec., 189, subd. 10) of 30 per cent upon ton mile theory, the extra cost was $17,007.81, far more than the net returns. The only way to prevent this result is to make the original and equal division of freight expense as between state and interstate upon the ton mile basis, because that reduces freight expense to about one-half, and then figure the extra cost to the lowest possible figure. If that division be made upon the basis of revenue, then the *slightest* allowance for extra cost makes the rates confiscatory as to every road separately, whether passenger and freight rates be or be not jointly considered. If the division be made upon a ton mile basis, and extra cost be estimated at 250 per cent or more, as justified by the evidence, the rates are confiscatory as to all roads.

II.

The effect of the findings below that the rates were clearly confiscatory.

The court below found the rates to be confiscatory. This finding was made from 5027 printed pages of evidence specifically

applicable to all roads traversing the same territory. In the light of the peculiar circumstances surrounding the case, great weight should be given to the finding. It surely was as effective as like action by a master would have been. Especially is this true in view of the extended inquiry of the experts, their long oral cross examinations and the reasons given for their methods of dividing expenses and their determination that it costs more to do the state than the interstate business. This court cannot possibly be in as good a situation to pass upon the facts found as was the court below.

1. Opportunities of the State to Obtain the Facts.

The state had every opportunity to ascertain the facts. Besides this, the law presumed it ascertained all the facts before it attempted to fix the rates by legislative enactment. If it failed so to do, the legislative acts should not be permitted to stand.

Finding 4 (Rec., 5307) recites:

> "Pending this litigation each of the complainant companies made and delivered to defendants statements showing the earnings and expenses for certain periods, *which statements have been taken by both sides as sufficiently illustrative of the situation for the determination of these cases.* The companies extended to the state officers, defendants herein, acting by experts by them selected, the opportunity to examine the statements and the books, papers, vouchers, and records of the companies."

Finding 5 (Rec., 5308) recites:

> "The parties were producing evidence and preparing their evidence for about one year with the aid of experts on each side. These experts were all men of high character and great proficiency as railroad accountants. The experts on each side were given *the fullest opportunity and all the time desired*

to obtain the information and put the same in form in exhibits, schedules and reports, all of which are in evidence in the cases, supplemented by the oral testimony of each of the experts with reference to all of these things."

A. P. Taliaferro (Rec., 4557-4558) chief expert for the state, testified:

"Q. A great deal has been said about the books of these companies, and you not having access thereto. Now there are 18 railroads interested in this matter, all of which have furnished statements long ago; now have you anything to say except words of commendation as to the way the representatives of all the railroads have extended every facility and courtesy to you in the way of giving you full and free access to everything? A. No, sir, I have not. They have extended every facility and every courtesy. And we have not been denied anything.

Q. So if the state had wanted to employ an army of experts, the whole railroad situation as disclosed by their books and papers was open to the state, if it wanted to examine them? A. So far as I know, yes."

Again, (Rec., 4580), he said:

"Q. Those figures have been in your hands for months, haven't they? A. I have said we have no criticism to make on them.

Q. I want to know if they are correct? A. We have not checked them, I said.

Q. You have no criticism to make of them? A. We have no criticism at all."

Again (Rec., 4672), he said:

"Q. You had all the opportunity for examination in the Santa Fe that you had in the other cases? A. Yes, sir.

Q. And every courtesy shown you and every facility extended? A. Yes, sir.

Q. And for the purposes of this case you have no criticism to make upon that? A. Not at all."

Again (Rec., 4495):

"Mr. Ladd: In your investigations have you gone into the auditor's offices of the different railroad companies you have investigated? A. Yes, sir. My work has been largely in the auditors' offices.

Q. What have you examined generally speaking in those offices? A. Of course we could not go over all the details, but would have to satisfy ourselves of the correctness of the methods used, by testing the figures in various ways, and going into every phase of the earnings and expenses, and their division between state and interstate, so far as the earnings are concerned.

Q. To that end have you examined the way-bills and the conductors' reports, and things of that sort? A. Some of them, yes. We have gone into any and everything that we thought might help to show the facts."

T. A. Hamilton (Rec., 4634) another of the state's experts said:

"Q. I wish to ask you, Mr. Hamilton, whether you agree with Mr. Taliaferro, that you have been given free access to all the books and papers and so on, by the various auditors of these different roads in all your investigations. That is true of all these roads? A. Most emphatically.

Q. And you find in that respect nothing but words of praise to speak of the various auditors? A. We have been treated in that respect with all courtesy."

Finding 6 (Rec., 5308) recites:

"It was conceded by the experts that the companies fairly, accurately and honestly kept their books showing the facts in

these findings set forth. The experts of the state and of the companies have hereby been enabled to present with certainty and precision all the earnings within the state, both state and interstate business."

2. THE STATE REFUSED TO REQUEST ANY FINDING OF FACT OR POINT OUT ANY ERROR OR INACCURACY THEREIN.

The findings begin (Rec., 5305) with this statement:

"Prior to the argument the court requested counsel on both sides to submit requests for findings of fact. Complainants' counsel did this. Defendants' counsel have not done so."

The railroads as stated, made (Rec., 129-166) specific requests for findings.

In making its figures the court (Finding 17, Rec., 5315) below said:

"These are found to be correct as now to be set forth, and are adopted by the court. If any error has crept into them, the court will make proper correction upon his attention being called thereto after these findings have been filed, which can be readily done upon motion or suggestion."

Finding 20 (Rec., 5327) recited:

"The court believes that the foregoing findings are all that are material and all that are necessary to make. *However, if any party believes that any material finding of fact has been omitted, upon application of such party the same will be considered and made if deemed advisable. And likewise if any of the foregoing computations or figures have been erroneously made.* But such application to be entertained must be made within thirty days from this date."

Notwithstanding the invitation, the state at all times refused to make any request, or to suggest any error, mistake or inaccuracy in the findings, before or after they were filed. These facts are entitled to consideration. It is true that after the decree it started a suit in a *nisi prius* state court and obtained an *ex parte* temporary injunction compelling the railroads to keep in force the two cent rate which was below decreed to be confiscatory. The state supreme court, however, upon June 8, 1909, arose to the occasion and by prohibition (*State ex rel.* v. *Williams*, 221 227) nullified this bold attempt to provoke a public controversy and defy the mandate of the federal court. After that, on July 28, 1909, (Rec., 5265), an appeal was taken here in the C. B. & Q. case (Nos. 130, 134), and the state by its assignment of errors made its *first* complaint as to the correctness of any finding, and even then only in general terms.

Thereafter every effort was made to prevent the other cases from being heard at the same time (Statement, *supra*, Div. 1, subd. i, j, k, l.)

3. The Effect to be Given the Findings.

The evidence discloses that the rates in question are confiscatory. If, however, there were any question as to the *weight* of the evidence, it is to be remembered that the cases now stand upon appeal, where the matter is viewed somewhat differently, than if they were being presented to a court of first instance. Every presumption is in favor of the finding below (*Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep., 765, 807, 808), which must be sustained unless the record shows there has been some clear misconception of the evidence or misapplication of the law. This rule has been frequently announced as applicable to masters' reports (*Tilghman* v. *Proctor*, 125 U. S., 126, 149, 31

L. Ed., 664, 668; *Callaghan* v. *Nyers*, 128 U. S., 617, 32 L. Ed., 547, 562; *Furrer* v. *Ferris*, 145 U. S., 132; 36 L. Ed., 649; *Fisher* v. *Shropshire*, 147 U. S., 133, 146, 37 L. Ed., 109), especially where the reference was by consent, and of recent years has been applied to the findings in equity cases by the court below. Thus, in *Warren* v. *Burt*, 7 C. C. A., 105, 110, 58 Fed. Rep., 101, 106, Judge Sanborn, with the concurrence of Mr. Justice Brewer, said:

> "Where the court below has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tilghman* v. *Proctor*, 125 U. S., 136, 8 Sup. Ct. Rep., 894; *Kimberly* v. *Arms*, 129 U. S., 512, 9 Sup. Ct. Rep., 355; *Evans* v. *Bank*, 141 U. S., 107, 11 Sup. Ct. Rep., 885; *Furrer* v. *Ferris*, 145 U. S., 132, 134, 12 Sup. Ct. Rep., 821."

This has since become the settled rule of appellate practice, as will be seen from the opinions of Judge Sanborn (*Paxon* v. *Brown*, 10 C. C. A., 135, 144, 61 Fed. Rep., 874, 888; *Stuart* v. *Hayden*, 18 C. C. A., 618, 623, 72 Fed. Rep., 402, 408; *Fitchett* v. *Blows*, 20 C. C. A., 286, 290, 74 Fed. Rep., 47, 51; *Farmers Loan & Trust Co.* v. *McClure*, 24 C. C. A., 64, 65, 78 Fed. Rep., 209, 210; *Mann* v. *Bank*, 29 C. C. A., 547, 549, 86 Fed. Rep., 51, 53, *Exploration Co.* v. *Adams*, 45 C. C. A., 185, 188, 104 Fed. Rep., 404, 408; *Thallman* v. *Thomas*, 49 C. C. A., 317, 323, 111 Fed. Rep., 277, 283; *Manhattan Life Ins. Co.* v. *Wright*, 61 C. C. A., 138, 126 Fed. Rep., 82, 83; *Paulus* v. *Buck Mfg. Co.*, 64 C. C. A., 162, 129 Fed. Rep., 594, 597; *Coder* v. *Arts*, 82 C. C. A., 91, 94, 152 Fed. Rep., 943, 946; *State of Iowa* v. *Carr*, 191 Fed. Rep., 257, 263); Thayer (*Snyder* v. *Dodson*, 21 C. C. A., 76, 74 Fed. Rep., 757, 758; *Board of Commissioners* v. *Irvine*, 61 C. C. A., 607, 126 Fed. Rep., 689, 698; *Order of United Commercial Travelers* v.

M'Adam, 61 C. C. A., 22, 128 Fed. Rep., 358, 365, 366); Morrow (*Idaho Min. & Mill Co.*, 59 C. C. A., 200, 123 Fed. Rep., 396, 397, 398); and Riner (*Big Six Development Co.* v. *Mitchell*, 70 C. C. A., 569, 138 Fed. Rep., 279).

Here *by agreement* the court heard the case upon oral evidence and dispensed with the master (Rec., 114). The finding ought, therefore, to be as effective as if it had been made by a master, and should be given great weight, especially in view of the facts recited (Rec., 5300-5301) in the opinion:

> "Thousands of pages of testimony, taking weeks of time, have been filed. This testimony was orally presented, part to the master, and part to the court, accompanied with volumes of statements, reports, schedules and tables. Every phase of every question of both debit and credit has been worked out, tabulated and filed. These exhibits are the result of something like one year of work by the expert accountants representing both sides, as a result of their examinations of train reports, waybills, auditors' books, and of the accounts of the passenger and traffic departments of the several roads. This work required not only much time, but energy, and patience, and learning, and great skill. But each side had accountants of the highest character, and possessing all of those qualifications. The four accountants, Mr. Peabody and Mr. Johnson representing the railway companies, and Mr. Taliaferro and Mr. Hamilton representing the state, impressed me after hearing them testify and being in consultation with them for ten days after the cases were submitted, that the sole purpose of their work was to exhibit the truth, *differing only as to extra cost, and that difference of extra cost largely confined to the local passenger traffic, and differing as to the theory as to how the expenses between local and interstate traffic within the state should be divided. Aside from those two questions there is not the slightest variance between the testimony of the experts upon the two sides.* During the ten days following the submission of the cases, they and the court being alone, at the request of the court they prepared a statement in each of the nine cases submitted, which have been ordered filed. To each of the nine statements is appended a certificate showing the time covered, and that such statement correctly shows the results of the various assumptions set forth

therein, which certificates were signed by the four expert accountants. Seldom, if ever, is a court under greater obligations to expert accountants representing the two sides, than the court and all parties, the railroads and the public, owe these four gentlemen. Usually experts representing different sides do not agree to anything. *Here experts representing the different sides agree to everything pertaining to the accounting, the differences only arising as to the basis.* The court is likewise much indebted to counsel on both sides, who for four days argued these cases with a fairness and wealth of learning, and eloquence seldom displayed at the bar. And now after the fullest investigation of the record, the court has reached the conclusion that upon this question of fact the statutory rates fixed by either and both statutes are not remunerative. And it only remains for the court to give the reasons for such conclusion."

So, finding 14 (Rec., 5311, 5312) recites:

"After the arguments were concluded at the request of the court, and *with the consent of the parties,* two experts upup each side, two selected by the railways and two by the defendants, worked with the court for something more than one week. These experts were the same gentlemen representing their respective sides who had done much of the work in preparing the cases for the respective sides for hearing. The court requested these experts to take the numerous tables and tabulate them already in evidence and to confine themselves wholly to that which had been introduced in evidence in the cases, and to make therefrom a new table for each of the nine cases showing the earnings and the expenses chargeable to each class of earnings according to the respective theories covered by counsel in the arguments. The court further requested said four experts after preparing said new tables that if they agreed, to affix their signatures thereto. This they did below a certificate reciting that the statement of earnings, operating expenses, etc., as to each particular road for the time therein given, correctly shows the results on the various assumptions set forth therein. Said nine statements were by order of this court, February 20, 1909, ordered filed and made of record in the cases. The said nine statements are now and here referred to, and are made part hereof. Each of said nine statements is found by the court to be correct upon the respective theories presented."

Judge Sanborn's remarks (*Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep., 765, 808, 809) as to the action of a master are in a broader sense applicable to a trial judge. He said:

"But the question whether fares and rates which have been put in operation confiscate the property of the companies in violation of the Constitution of the United States is a judicial, and not a legislative, question. And when that issue is presented the rules of law, of equity, and of practice applicable to the determination of judicial questions have effect. When, therefore, rates have been tried by actual use for many months, and their effect has become known and is proved, when the issue whether or not they take the property of the railroad company without just compensation has been made in a competent court, and all parties have introduced, in the presence, and subject to the cross-examination and rebuttal, of each other, all the evidence they desire, when that issue and the numerous subordinate issues it involves have been heard and decided, as they have been in the case in hand, by a master, who has personally heard the testimony of every witness, received and examined all the evidence, and made specific findings of every material issue of fact in the case, the judicial presumption arises that his findings are right. This is a presumption of reason as well as of law, a presumption that forces itself upon and compels the reflective mind. Take the general issue. The Legislature and the Commission decided it upon the information they had acquired as to the probable effect of the rates they were making before those rates were tried. The master decided it after the fares and all the rates, except the commodity rates, had been tried for many months and their actual effect was known and proved. The former decision was based on the conjectural effect of the rates; the latter, on their actual effect. The master decided this issue upon a full trial, in which all parties produced all their evidence, subject to the cross-examination and rebuttal of each of the other parties, in the manner which the wisdom and experience of centuries has taught is most conducive to the discovery of the truth and the administration of justice. The Legislature and the Commission decided it without such trial or such proof. Doubtless, if the fares and rates had been tested by the actual operation of the railroads under them and the plenary proof of their effect and of the other facts presented to the master had been introduced before the Legislature and the Com-

mission, they would have reached the same conclusions which the evidence forced upon the master's mind. They decided the issue upon evidence more conjectural or speculative; he, upon proof more certain and conclusive. And the presumption that a master learned in the law, accustomed by long experience at the bar and on the bench to hear and analyze evidence and draw just conclusions therefrom, has faithfully discharged his judicial duty and reached right results, is not less strong than the presumption that the Legislature and the Commission rightly discharged their official duties. The result is that when, after fares and rates have been in effect for months, plenary proof of that effect and of other facts pertinent to the issue of confiscation *vel non* is made before a master who finds the facts, the legal or judicial presumption that his findings are just and right, while not conclusive, is superior to the original presumption that they were just and reasonable, which arose before they were or could be tried, and it prevails over it. The question, therefore, upon the exceptions to the master's report, is not, is there any evidence upon which one might fairly, in the exercise of an honest judgment, reverse his findings? But it is, are the findings which are presumptively right sustained by clear proof? If they are, they should be affirmed, and the exceptions to them should be overruled."

4. The Effect of the State's Consent to the Freight Injunctions.

The rates in question on any and all classes of business are absolutely confiscatory unless, to *obtain* as between state and interstate business, the original or equal cost of each, there be a division of freight expenses upon the ton mile basis. When this is done, the freight rates are confiscatory unless a very large percentage be added as the extra cost. Even when a division is made upon a ton mile basis and a small percentage is estimated of extra cost, the passenger rates are confiscatory unless they are combined with the freight rates and thereby absorb some of the losses there sustained. This theory makes necessary to the state a large return from freight

rates and a small expense upon account thereof. The state freight rate is therefore to the state the life of its case. Yet it has practically conceded at all times that there was no complaint as to the injunction against same. The Governor, in approving the act of 1905 (Rec., 2450-2451) admitted that there had been no investigation and invited the litigation, so that after being advised thereby of the facts, new state freight rates could be fixed. The original order for a temporary injunction was practically by consent, for after a previous restraining order (Rec., 15) had been continued (Rec., 16) in force by consent, the injunction was granted (Rec., 19), the state consenting to a nominal bond of ten thousand dollars without surety and refusing to make an issue as to the facts, so that the only question presented to the court was whether the bill stated a cause of action. That question was foreclosed by *Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819. The same orders were entered and the same course taken in all the cases (*supra*, Statement, Div. 3). The temporary injunctions as to the freight rates under the act of 1907 were *by consent*, because finding 6 (Rec., 5608) recited:

> "*By agreement of both sides in open court*, in June, 1907, this court issued a temporary injunction against the enforcement of the freight rate statute."

So in the supplemental opinion (Rec., 5330; 168 Fed. Rep., 359) it was said:

> "Upon a hearing, *by agreement of counsel on both sides*, a temporary injunction was issued against the enforcement of the freight rate statute."

In view of these suggestions, it is scarcely conceivable that, as now contended, every one has at all times been wrong and that

the rates were ample because of a large net return upon state freight, and that thereby even confiscatory passenger rates have been saved.

III.

The rates are confiscatory.

1. METHODS BY WHICH CONFISCATION IS TO BE DETERMINED.

We proceed then to a consideration of the methods adopted to ascertain the sufficiency of the rates and the results flowing therefrom.

(a) *Precedents.*

Judge McPherson in an elaborate opinion (Rec., 5286-5304) and special findings of fact (Rec., 5305-5327) reached the conclusion that the rates in question were clearly confiscatory. His method of ascertaining their insufficiency was upon the same principle as that adopted in the Oklahoma (*A. T. & S. F. R. R. Co.* v. *Love*, 167 Fed. Rep., 493, upon appeal 185 Fed. Rep., 321, 107, C. C. A., 403; certiorari, denied, 218 U. S., 675, 220 U. S. 618), Arkansas (*In re* Arkansas Rates, 163 Fed. Rep., 141; upon final hearing, 187 Fed. Rep., 290), Nebraska (*Ames* v. *Union Pac. R. Co.*, 64 Fed. Rep., 165; *Smyth* v. *Ames*, 169 U. S., 469, 42 L. Ed., 819), South Dakota (*C. M. & St. P. R. Co.* v. *Tompkins*, 176 U. S., 167, 44 L. Ed., 417); North Dakota (*Nor. Pac. R. Co.* v. *Keyes*, 91 Fed. Rep., 47), Minnesota (*Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep., 765) and Pennsylvania (*Penn R. Co.*

v. *Philadelphia County*, 220 Pa., 100, 68 Atl. Rep., 676; *Central R. Co.* v. *Northampton County*, 11 Northampton Co. Ct. Rep., 342) cases.

(b) *Method of ascertainment.*

This method of ascertainment was:

The value of the property of the railway company in the state was first determined. The entire railroad and all its facilities and instrumentalities, wholly undivided, are devoted to all the business, state, interstate, freight and passenger. It was, therefore, necessary to determine the value of such portions thereof as were devoted respectively to the carriage of the state freight and passengers. This assignable proportion of value was ascertained upon what is known as the revenue basis, i. e., by an assignment of such proportion of the total value of the entire property in the state as the earnings from the carriage of state freight and state passengers each bore to all the earnings of all kinds from all the property within the state. When the assignable proportion was thus ascertained as to each class of business, six per cent was calculated thereon as the least annual return to which the owner was entitled. So far there was, as will hereafter be seen, no difference between the parties.

There were next ascertained the actual earnings from the carriage of state freight and passenger business, respectively, so as to see whether they equaled the sum which the owner was entitled to receive as a return upon the assignable proportion of value. The earnings from any and all classes of business are capable of separate and exact ascertainment. The total expenses within the state, divided as between passenger and freight business, are, and were below, easily ascertained. It is not possible, however, to accurately subdivide the expenses, so separately found, as between state and interstate business. The first and equal division

was therefore made in proportion to the revenue from that class of business instead of dividing, as the state contended, the freight expense upon the basis of ton mile, and the passenger upon the basis of the passenger mile percentages. The freight expense within the state was, as between state and interstate business, first divided in the proportion of the freight carriage earnings to the entire freight earnings in the state. So the entire passenger expense in the state was, as between state and interstate business, divided in proportion to the entire passenger earnings in the state. The state freight and passenger expenses, respectively, thus ascertained, deducted from the earnings from its class of business, left the net earnings, before deducting the extra cost, if any, of doing that portion of the state business. This was what has been termed the first or equal division of expenses as between state and interstate business.

There was also deducted from the state freight earnings, the state conceding it to be proper, the diminution there would have been thereon had the enjoined rates been put in force, as was in *Smyth* v. *Ames*, 169 U. S., 469, 42 L. Ed., 819 and *Ames* v. *Union Pac. R. Co.*, 64 Fed. Rep., 165, decided should be done.

It costs more to do the state than the interstate business. This the state conceded as to freight, but said the contrary was true as to the passenger traffic. The amount of this extra cost can be determined only from the judgment of experts. The amount thus ascertained for each class of business should be deducted from the net earnings found as aforesaid. If the result thus ascertained does not equal the six per cent return upon the assignable proportion of value, the rate is confiscatory.

That the method of ascertainment adopted below is in all respects correct is demonstrated by the foregoing cases, as well as by the recent able and thorough opinion of Judge Hook in *M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493, affirmed upon appeal (185 Fed. Rep., 321, 107 C. C. A., 403) and certiorari here twice

denied (218 U. S., 675; 220 U. S., 618). It was the same method suggested by Mr. Justice Van Devanter (*In re Arkansas Rates*, 163 Fed. Rep., 141) when circuit judge, and in substance applied upon final hearing by Judge Trieber in the Arkansas (187 Fed. Rep., 290) and by Judge Sanborn in the Minnesota (184 Fed. Rep., 765) case. It was also applied recently in Pennsylvania (*Penn. R. Co.* v. *Philadelphia County*, 220 Pa., 100, 68 Atl. Rep., 676, 679; *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep., 342). But more upon this subject will be said hereafter.

2. The Value of the Property.

At the threshhold of this case then lies the question of valuation, for the return upon that is the vital question in the case. All courts and both parties agree as to this.

(a) As a start upon the question of valuation, there must be ascertained the value of the whole property in the state devoted to all its uses. Presumptively, the bonds and stocks properly apportioned, represent that value. (*Ames* v. *Union Pac. R. Co.*, 64 Fed. Rep., 165, 177; *So. Pac. R. Co.* v. *Bartine*, 170 Fed. Rep., 725, 751). However, included therein as elements of value, are the income, good-will, franchises, cost of construction, action of the state equalizing board, and other considerations, such as the company being a going concern.

The rule under which this valuation is to be determined has been accurately state by Mr. Justice Brewer (*Ames* v. *Union Pacific R. Co.*, 64 Fed. Rep., 165, 177); by Mr. Justice Harlan (*Smyth* v. *Ames*, 169 U. S., 466, 547); by Mr. Justice Peckham (*Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19); by Judge Morrow (*Spring Valley Water Works* v. *San Francisco*, 124 Fed. Rep., 574, 592, 593); by Judge Hook (*M. K. & T. R. Co.*

v. *Love*, 177 Fed. Rep., 493); by Judge Sanborn (*Love* v. *A. T. & S. F. R. Co.*, 185 Fed. Rep., 321, 107 C. C. A., 403; certiorari being here twice denied, 218 U. S., 675, 220 U. S., 618; *Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep., 765, 808-813); by Judge Trieber (*In re* Arkansas Rates, 187 Fed. Rep., 290); by Judge Farrington in the Nevada case (*So. Pac. R. Co.* v. *Bartine*, 170 Fed. Rep., 725, 751), and by Judge McPherson below (Opinion, Rec., 5286-5327).

The question received intelligent consideration from the New York Court of Appeals in *People* v. *State Board*, 196 N. Y., 39, 89 N. E. Rep., 581, where it was said that this valuation was to be fixed as of the time when the inquiry was made, which must necessarily be the result, because an injunction, when it finally goes, is subject to the condition that it may be dissolved in the future if time proves them to be reasonable. (*Ames* v. *Union Pacific R. Co.*, 64 Fed. Rep., 165; *Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819; *In re* Arkansas Rates, 187 Fed. Rep., 290, 349; *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep., 342.)

(b) We turn to some of these decisions from which it will be seen that the whole valuation is to be based upon the consideration of all the facts and circumstances in evidence, bonds, stocks, franchises, cost of construction, earnings and other matters.

In *Ames* v. *Union Pacific R. Co.*, 64 Fed. Rep., 165, 177, Mr. Justice Brewer said:

> "It is not easy to always determine the value of railroad property, and *if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or the other of these represents it,* and computation as to the compensatory quality of rates may be based upon such amounts. In the cases before us, however, there is abundant testimony

that the cost of reproducing these roads is less than the amount of the stock and bond account, or the cost of construction, and that the present value of the property is not accurately represented by either the stocks and bonds, or the original construction account. Nevertheless, the amount of money that has gone into the railroad property—the actual investment, as expressed, theoretically, at least, by the amount of stock and bonds—is not to be ignored, even though such sum is far in excess of the present value."

The italicized words were recently applied by Judge Farrington (*So. Pac. R. Co.* v. *Bartine*, 170 Fed. Rep., 725, 751), in Nevada.

In *Smyth* v. *Ames*, 169 U. S., 466, 547, 42 L. Ed., 819, 849, Mr Justice Harlan said:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

These views were thoroughly reviewed and applied in *Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep., 765, 802, 810. How Mr. Justice Van Devanter, then circuit judge, fixed this value (*In re Arkansas Rates*, 163 Fed. Rep., 141), does not appear in the

report of the case before him. But upon final hearing (187 Fed. Rep., 290, 310) Judge Trieber said:

> "By the acts of complainants the court is relieved of a very difficult problem, that of the valuation of the property. In the bills of complaint the railroads only ask for compensatory rates on the basis of valuation according to the assessment of their property for taxation by the state of Arkansas made by the State Board of Railroad Assessors. Its reasonableness is, of course, conceded by the defendants, and therefore there is no necessity for the court to determine what rules should govern in ascertaining what the investments on which complaints are entitled to a reasonable compensation are. It is proper to state here that it is agreed by the parties that the assessments for taxation in the state of Arkansas are on a basis of 50 per cent. of the real value of the property, and that these assessments were made on that basis. For this reason the assessments must be doubled to ascertain the real value of the property."

This statement is quite significant, for both parties here fixed the value upon the basis adopted by the State Board, i. e., three times the assessment in all but two of the cases and twice as much as to them.

Below, (Rec., 5302; 168 Fed. Rep., 317, 354), Judge McPherson said:

> "There is no evidence that any of the existing bonds were improperly issued either as to amounts or rates of interest. In fixing the value the court has considered the evidence of witnesses as to the stocks and bonds outstanding, and the court has considered the evidence of the fact that the Missouri State Board for taxing purposes has valued these properties. Of course those findings are not binding nor conclusive, but they are persuasive."

Finding 9, (Rec., 5311) makes substantially the same recital.

In the Oklahoma case, Judge Hook (*M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493, 495, 496, affirmed, 185 Fed. Rep., 321, 107 C. C. A., 403; *certiorari* denied, 218 U. S., 675; 220 U. S., 618), upon this subject said:

"In logical order there should first be found the value of the company's entire railroad property devoted to public use within the state, upon which, from all its operations therein, it is entitled to reasonable returns. Mr. Justice Harlan, in *Smyth* v. *Ames*, (169 U. S., 466, 546-7), said: 'We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property.' There is a tendency to deny the amount and value of outstanding stocks and bonds as evidences of value. Wholly aside from any consideration of the rights of investors in good faith or of the general consensus of public opinion as exhibited in a normal market for the securities, such evidences imply a recognition of the effect upon local value of influences without the state. A company may have, elsewhere, property of given value employed in aid of all its transportation business. Distant connections with important commercial centers, an outlet to tide-water and the like may affect favorably the worth of every mile of road in the system. It is general knowledge that there is an important element of value in a railroad as a whole which the part within the state, solely and separately regarded, does not possess. While the question ultimately is the value of the road within the state, the influence upon that value of things external is to be considered; and in the common judgment of men it is to some extent reflected in the amount and value of the stocks and

bonds resting upon the system. Nor can it properly be said that such influence affects only the value for the interstate business of the company with which the state is not concerned in making local rates. There is too intimate a relation between commerce within the state and that among the states, and too much interdependence in their mutual growth and prosperity. A railroad system is essentially a unit and is generally so regarded. For instance the part within the state may be assessed for local taxation at its value as an organic portion of a larger whole. (*C. B & Q. R. Co.* v. *Babcock*, 204 U. S., 585, 598; *Western Union Tel. Co.* v. *Gottlieb*, 190 U. S., 412; *A., T. & S. F. R. Co.* v. *Sullivan*, 173 Fed. 456). A value of a railroad in a state for local taxation would seem also to be there when rates of transportation are fixed. The assessed value and the acknowledged basis upon which the assessment is made express the judgment of public officers charged with the duty of investigation under the forms of the law and should receive due consideration. There is another matter to be regarded, not specifically mentioned in the above excerpt from the opinion of Mr. Justice Harlan. An established railroad system may be worth more than its original cost and more than the mere cost of its physical reproduction. It has passed the initial period of little or no return to its owners which, of greater or less duration, almost always follows construction, and is not infrequently marked by default and bankruptcy. The inevitable errors in its building which finite minds and hands cannot avoid have been measurably corrected, time and effort have produced a commercial adjustment between it and the country it was intended to serve, relations have been established with patrons, and sources of traffic have been opened up and made tributary. In other words, the railroad, unlike one newly constructed, is fully equipped and is doing business as a going concern. It has attained a position after many experiences common to railroad enterprises which entail loss and cost not paid from current earnings and which correspondingly make for value."

That the franchise value is to be considered has frequently been the subject of consideration and recognition. This was

stated and affirmed in *Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 44, 53 L. Ed., 382, 396, where Mr. Justice Peckham said:

> "It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation. *Monongahela Co.* v. *United States*, 148 U. S., 312; *People* v. *O'Brien*, 111 N. Y., 1, and cases cited. The important question is always one of value. * * * We think that *under the above facts* the court ought to accept the valuation of the franchise fixed and agreed upon under the Act of 1884 as conclusive at that time. The valuation was provided for in this act, which was followed by the company, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years past on the basis of the validity of the valuation and of the stock issued by the company. * * * What has been said herein regarding the value of the franchises in this case has been necessarily founded upon its own peculiar facts, and the decision thereon can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us. We simply accept the sum named as the value under the circumstances stated."

This adopted and carried out the doctrine theretofore asserted by Judge Morrow (*Spring Valley Waterworks* v. *San Francisco*, 124 Fed. Rep., 574, 592, 593), and Mr. Justice Brewer (*Monongahela Navigation Co.* v. *U. S.*, 158 U. S., 312, 328, 37 L. Ed., 463, 468, 469), applying the rule both to rate and condemnation cases. So in tax assessments the franchise is always an element of value to be taxed (*State Railroad Tax Cases*, 92 U. S., 602, 605, 23 L. Ed., 663; *Columbus Southern Railway* v. *Wright*, 151 U. S., 470, 479, 38 L. Ed., 238, 243). In the latter case, in affirming the estimate of a franchise value, it was said:

> "The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the nar-

row strip of land appropriated for the use of the road, and the bars and cross-ties thereon. The value of the roadway at any given time is not the original cost, nor, a *fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails and spikes. The value of land depends largely upon the use to which it can be put and the character of improvements upon it. The assessable value for taxation, of a railroad track, can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock."

In applying the same principle to an express company (*Adams Express Co.* v. *State Auditor*, 165 U. S., 194, 221, 41 L. Ed., 683, 695) it was said:

"No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons, and furniture, *than that of railroad, telegraph and sleeping-car companies, to road-bed, rails and ties, poles and wires, or cars.* The unit of use and management, and the horses, wagons, safes, pouches and furniture, the contracts for transportation facilities, and the capital necessary to carry on the business, whether represented in tangible or intangible property, in Ohio, possessed a value in combination, and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others. We repeat that, while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership It is the unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case,—resulting from the very nature of the business * * * ."

In *Pittsburg, etc., Railway Co.* v. *Backus,* (154 U. S., 421, 429; 38 L. Ed., 1031, 1037), it was said:

> "When you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

In *Franklin County* v. *Nashville, Chattanooga, etc., Railway,* 12 Lea., 521, 539, the Supreme Court of Tennessee, in a well considered opinion, which was quoted with approval by this court in *Columbus Southern Railway* v. *Wright,* 151 U. S., 470, 479, thus referred to the means of ascertaining the value of a railroad track:

> *"The value of the roadway at any given time is not the original cost, nor a fortiori, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes.* The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock."

In *Metropolitan Trust Co.* v. *Houston & Texas Central R. R.,* 90 Fed. Rep., 683, Circuit Judge McCormick had occasion to review the valuations placed upon the Texas railroads and, among other things, said:

> "Promoters and proprietors of roads have looked to the future, as they had a right to do, and as they were induced to

do by the solicitations of the various communities through which they run, and by various encouragements offered by the state. The Commission, in estimating the value of these roads, say that they included interest on the money invested during the period of construction. This is somewhat vague, but the 'period of construction' mentioned is probably limited to the time when each section of the road was opened to the public for business. And even if extended to the time when the road was completed to Denison and to Austin in 1873, nearly twenty years after its construction was begun at Houston, it would not cover all of the time, and possibly not nearly all of the time, in which the railroad company and its predecessors have lost interest on the investment. The estimate made on behalf of the railroad in this case of the cost to that company and to its predecessor company of the railroad property, and the business of that company as it exists today, may not be exactly accurate—clearly is not exactly accurate; but it seems to me that it is not beyond the fair value of the property, as it is shown to have been built up and constituted, and to exist today as a going business concern, and that such rates of fare for the carriage of persons and property as are reasonable, considered with reference to the cost of the carriage and the value of the carriage to the one for whom the services are rendered, cannot be reduced by the force of state law to such a scale as would appropriate the value of this property in any measure to the use of the public without just compensation to the owners thereof, and would deprive the owners thereof of the equal protection of the law guaranteed by the Constitution of the United States, as cited."

In re Advance in Freight Rates, 9 I. C. C. Rep., 382, the Interstate Commerce Commission expressly condemned the rule of undertaking to value a railway by simply estimating the cost of reproducing it. The Commission there said:

"The cost of reproducing railway property has been suggested as a basis upon which return should be allowed. *But this, while of great assistance in arriving at a just result, could not be taken as an exclusive guide. Many of our railways were built years ago, when the cost of construction was much greater than now. In the development of that industry they have been reconstructed and improved. The first outlay*

has perhaps been rendered practically worthless, and a railway honestly managed, never having paid excessive dividends, may actually represent today much more money than the present cost of building. Those who originally invested their money in this enterprise and have kept pace with the public necessities ought not be required to bear the entire burden of this shrinkage. Moreover, the value of a railway system does not depend upon the mere cost of its embankment, or its equipment. It is rather a question of location, of connections, of terminal facilities, of enterprises along its line; and shall nothing be allowed to the foresight and ability which have marked out and perfected that system?"

(c) In any event, interest actually paid should always be returned. Certainly the bonded debt upon which for years interest has been paid as in these cases, is substantial evidence of value. This is especially true of great systems like the St. L. & S. F., C. B. & Q., K. C. S., M. K. & T., A. T. & S. F., and C. R. I. & P. The authorities leave no doubt upon the subject that interest upon bonds of a going concern is at least a criterion of a higher value than the amount of the bonded debt.

After *C. M. & St. P. R. R.* v. *Tompkins*, 90 Fed. Rep., 363, was reversed (176 U. S., 167; 44 L. Ed., 417, 422), it was again tried (*C. M. & St. P. R. R. Co.* v. *Smith*, 110 Fed. Rep., 473, 475, 476) and Judge Carland said:

"The master also finds that, had the rates prescribed by the defendant's schedule been in force in the year 1897, the total net earnings of complainant, both interstate and local, would have been $180,389.02, which would have left a deficiency in the amount due for interest on bonds of $921,360.91. If this fixed charge of interest is an expense which complainant has a right to earn before the state may reduce its earnings, it becomes important to ascertain how much of this interest should be borne by the local earnings. It is found that if the rates proposed by the defendant had been in force in 1897, the net earnings would have been $88,784.60, and that the total net earnings for the same year on inter-

state business would have been $91,604.42. There seems to be no good reason why interstate and local business should not be charged with the interest on the South Dakota indebtedness in proportion to the amount of annual net revenue produced by each. * * * The solution of this question depends upon the further question as to whether interest on an honest debt is a fixed charge, which the complainant has a right to earn before any reduction in its earnings may be compelled by the state. It is claimed by counsel for complainant that the case of *Reagan* v. *Trust Co.*, 154 U. S., 362, 14 Sup. Ct., 1047, 38 L. Ed., 1014, is decisive upon this point. It is true in that case, which was brought by a second mortgage bondholder, that one of the reasons assigned by the court for its judgment was the fact that for three years prior to the filing of the bill the earnings of the company, above operating expenses, had been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, would so diminish the earnings that they would not pay one-half the interest on the bonded debt. Yet there are numerous other reasons assigned by the court for its judgment, and it cannot be said that the case was disposed of upon this one ground alone. But a careful consideration of all the rate cases decided by the supreme court compels the belief that it is the opinion of that court, that, when the earnings of a railroad, conducted efficiently, economically and honestly, with operating expenses in no case greater than such efficient, economical and honest management requires, are insufficient to pay one-half the interest on a valid debt, contracted, as found by the master in this case, in a careful, economical and honest administration of the company's business, then a schedule of proposed rates which materially reduce these earnings would be unjust and unreasonable. It must be taken as true in this case that the debt, which is bearing an average rate of 5.69 per cent per annum, is an honest debt. It is also true that if the interest is not paid upon the bonds which the mortgage secures the usual result is a receiver, and the consequent loss of the road.

* * * * I find by an examination of the case of *Reagan* v. *Trust Co.*, *supra*, that the earnings of the railroad whose affairs were under investigation in that case left a surplus over operating expense for the year 1889 of $858,732.24; for the year 1890, $498,177.24; for the year 1891, $555,091.59. The supreme court, in the face of these surplus earnings, granted an injunction, and assigned as one of the rea-

sons that the earnings of the company were not sufficient to pay one-half of the interest on the bonded debt, so that the conclusion necessarily follows that in the opinion of the supreme court, if the earnings of a railroad company do not pay but a small proportion of the fixed charges, then these surplus earnings cannot, in a true sense, be considered as dividends."

Unless the property is clearly shown to have been overbonded, then interest is a fixed charge which ought in any event to be paid. That there was no overbonding is the express finding below (Finding 9, Rec., 5311). Where money has been borrowed and mortgage bonds issued therefor, upon which for years interest has been paid, no court has ever yet denied that such charge was at least to be paid.

In Beale & Wyman on Railroad Rate Regulation, Sec. 388, it is said:

"It was generally agreed from the very first that whatever be the right to earn a dividend upon stock, the interest upon the outstanding bonds must be protected."

At Sec. 392:

"But the prevailing rate of interest upon bonds of like security is to be allowed to bondholders and the court will inform itself as to that."

At Sec. 393:

"Within the last ten years the general principle has become established that there must be left to those who conduct a public enterprise some adequate return on their investment. This newer view was well put in one sentence in *New*

Memphis Gas Light Company v. *New Memphis*, thus: 'The company has a right to such gross revenue from the sale of gas as will enable it to pay all legitimate operating expenses, *pay interest on valid fixed charges*, so far as bonds or securities represent an expenditure actually made in good faith, and also pay a reasonable dividend on stock, so far as this represents an actual investment in the enterprise."

This quotation from *New Memphis Gas Light Co.* v. *New Memphis*, 72 Fed. Rep., 952, finds ample support in other cases. In Beale & Wyman, Sec. 437, it is said:

"All this may well be; but as a matter of fact, the real situation is that a public service company must produce a certain amount of net income, discovered by deducting the gross annual expenses from the gross income, and that net income must be enough to pay all security holders their rate of return—*to the bondholders his stipulated interest*, to the stockholder his fair dividend. And according to modern constitutional law, both have the same protection, and both are subject to the same mischances."

In *C. & N. W. R. R. Co.* v. *Dey*, 35 Fed. Rep., 866, 879-880, Justice Brewer said:

"Compensation implies three things: Payment of cost of service, interest on bonds, and then some dividend. Cost of service implies skilled labor, the best appliances, keeping up the road-bed and the cars and machinery and other appliances in perfect order and repair. The obligation of the carrier to the passenger and shipper requires all these. They are not matters which the carriers can dispense with, or matters whose cost can by them be fixed. They may not employ poor engineers, whose wages would be low, but must employ competent engineers, and pay the price needed to obtain them. The same rule obtains as to engines, machinery, road-bed, etc., and it may be doubted whether even the legislature, with all its power, is competent to relieve railroad companies, whose means of transportation are attended with so much

danger, from the full performance of this obligation to the public. The fixed charges are the interest on the bonds. This must be paid, for otherwise foreclosure would follow, and the interest of the mortgagor swept out of existence. The property of the stockholder cannot be destroyed any more than the property of the bondholders. Each has a fixed and vested interest which cannot be taken away. I know that often the stockholder and the bondholder are regarded and spoken of as having but a single interest; but the law recognizes a clear distinction. A mortgage on a railroad creates the same right in mortgagor and mortgagee as a mortgage on my homestead. The legislature cannot destroy my property in my homestead simply because it is mortgaged, neither can it destroy the stockholders' property because the railroad is mortgaged. It cannot interfere with a contract between the company mortgagor and the mortgagee, or reduce the stipulated rate of interest; and so, unless that stipulated interest is paid, foreclosure of course follows and the mortgagors' rights, the property of the stockholders, are swept away. Whatever individuals may do by private contract to modify existing rates of interest, the legislature has no compulsory power in the matter. While, by reducing the rates, the value of the stockholders' property may be reduced, in that less dividends are possible—and that power of the legislature over property is conceded—yet, if the rates are so reduced that no dividends are possible, and especially if they are such that the interest on the mortgage debt is not earned, then the enforcement of the rates, means either confiscation, or compelling, in the language of the supreme court, the corporation to carry persons or property without reward."

Here the bonded debt was nearly equal to the valuations found (Statement, Div. 8, subd. b.). Moreover, if the bonded debt be taken as the value and extra cost allowed as below, the finding of confiscation must be upheld. The actual bonded indebtedness of the entire system of the C. B. & Q. was (Rec., 1383) $174,172,000 and stock $110,839,100 or a total of $285,011,100. Upon these bonds interest had always therefore been paid, and eight per cent dividends (Rec., 4757) upon the stock.

The earnings in Missouri are at least twenty per cent of all the earnings of the system (Ev. Fisher, Rec., 1001; Ev. Sturgis, Rec., 265), so that by a division upon a revenue basis there should, of stock and bonds, be allotted to Missouri $57,002,200, or more than the value found below. The actual market value of the Missouri part of the bonds and stock of the A. T. & S. F. was (Ev. Peabody, Rec., 4656; Ex. 74, Rec., 5018) $21,167,763.59 as against the finding (Rec., 5311) of value of $15,091,212. The Missouri proportion of the bonded debt of the St. L. & S. F. was (Rec., 4803) $67,724,987.87; of stock $17,060,874.52 (id.). The total value found was (Rec., 5311) but $61,238,414.70. The Missouri proportion of bonds of the C. R. I. & P. (Rec., 5037) was $17,553,306.89, and of stock $7,432,760.43. The valuation actually found (Rec., 5311) was $19,102,507.59. The Missouri proportion (Rec., 5055) of the K. C. S. was, of bonds, $7,979,-542.78, of stock $11,211,570.14. The value found (Rec., 5311) was $8,039,084.40. Of the M. K. & T. (Rec., 5074) the proportion was, of bonds $24,213,185; and of stock $14,603,125, as against a valuation found (Rec., 5311) of $20,894,229.93. Since in the absence of other proof, as was the case here, with all but the St. L. & H. and K. C. C. & S., (Finding 9, Rec., 5310; Opinion, Rec., 5302) the bonds and stock presumptively represent the value (*Ames* v. *Union Pac. R. R.*, 64 Fed. Rep., 165, 177; *So. Pac. R. Co.* v. *Bartine*, 170 Fed. Rep., 725, 751), these comparisons are of great significance and clearly show no overestimate of value.

(d) The findings are quite clear as to the value of all the roads in the state (Finding 11, Rec., 5311). The parties admitted (Rec., 752, 4634), and the agreed figures on both sides (Rec., 175-212) showed that the valuation by the State Board of Equalization of the property of each railroad was one-third of its estimate of actual value of the property assessed by it. This did not include (Rec., 4634) a large amount of rail-

road property which is assessed locally (Rev. Sts. Mo., Sec. 9360, 9361), at two and a half or three times its value (Rec., 4634). These values of all the property in the state were as thus found (Finding 11, Rec., 5311) by the court:

	Miles	Value	Value Per Mile
St. Louis & San Francisco	1688.89	$69,238,414.70	$36,259.00
Atchison, Topeka & Santa Fe	348.31	15,091,212.00	43,326.00
Chicago, Rock Island & Pacific	515.48	19,102,507.59	37,058.00
Kansas City Southern	174.48	8,039,084.40	46,075.00
St. Louis & Hannibal	120,61	1,143,077.02	9,477.00
Missouri, Kansas & Texas	506.21	20,894,229.93	41,276.00
Chicago, Burlington & Quincy	1136.34	53,172,907.83	46,793.00
Kansas City, Clinton & Springfield	151.01	2,380,222.48	15,762.00
Chicago Great Western	84.43	3,605,236.38	42,701.00

As to these figures, it was also (id.) found:

> "With the exceptions hereinafter stated, the above valuations of the properties of said nine companies as fixed, are in fact *practically* the same as those fixed by the state assessing board for the purpose of taxation. *But aside and apart from the valuations thus fixed by the state board, these findings are that upon the whole evidence said properties are at least of the values above fixed.* * * * In fixing the valuations above set forth there have been considered the immense terminal values of most of the roads, the amount of stock and bonds outstanding, what it would cost to duplicate the properties both with and without terminals in the large cities, and all the evidence bearing on present values, and in fixing said valuations the sums found are the minimum valuations, the properties being worth at least the sums thus fixed."

The percentages representing the assignable value were set forth in finding 17, Rec., 5315-5316).

If one were inclined to go into the facts, the value could not be made less than thus found. This admission (Rec., 4634-4635) was made:

> "Mr. Ladd: We have agreed in this case, as in the others, and that is already a matter of record, that the assess-

ments made by the State Board of Equalization is, for the purposes of this case, one-third of what the State Board regarded as the actual value. In the preliminary statement filed by the St. Louis & San Francisco Railroad Company, the assessment by the State Board is stated to be $20,412,-004.90. Now I would like to have Your Honor understand, of course counsel understands, that our agreement extends only to the action of the State Board. And the assessment of the State Board instead of $20,000 and something was $18,000 and something, nearly $19,000. And the difference between the assessment of the State Board and this figure of $20,000 arises from the fact that the County Assessors over the State assess certain portions of the property not within the jurisdiction of the State Board. The difference is about $1,559,000. Of course, as to that, our admission that that $1,559,000 is one-third of anything does not go, because we don't know on what basis the county assesses at. One might be acting one way and one in another.

Mr. Hagerman: Substantially all that $1,559,000 is local property in the large cities. In the other cases we agreed to that, I think. We agreed it was to be on the basis of 2½ times instead of 1/3."

Similar admissions were at other times made as to the other cases. Each statement by auditors and state experts as to each road so showed. Moreover, the assessments were offered by the state (Exhibits A-1, Rec., 5118-5238).

The representative experts from both sides, appointed by consent (Rec., 174) agreed upon the valuations upon this basis (Rec., 175-212), which accorded with the sums found to represent that value.

The figures with the percentages applied were, by the state's expert, conceded to be correct in each statement prepared by him as the state's theory of the cases. This was true in cases Nos. 672-3, St. L. & S. F., exhibits 61 (Rec., 4984) and 64 (Rec., 4988); cases Nos. 674-5, A. T. & S. F., exhibits 76 (Rec., 5022) and 78 (Rec., 5025); cases Nos. 678-81, C. R. I. & P., exhibits 80 (Rec.,

5040) and 81 (Rec., 5042); cases Nos. 682-3, K. C. S. exhibits 85 Rec., 5057) and 86 (Rec., 5060); cases Nos. 690-1, M. K. & T., exhibits 91 (Rec., 5079) and 92 (Rec., 5081) leaving the sum blank which is explained by the statement in evidence (Rec., 4722) adopting the figures of exhibit 89 (Rec., 5068); cases Nos. 130, 134, C. B. & Q., exhibits 103 (Rec., 5102) and 104 (Rec., 5105); cases Nos. 684-5, St. L. & H., and Nos. 698-9, K. C. C. & S., in which the state made no statements but accepted (Rec., 4712, 4742) the railroad statements as contained in exhibits 88 and 93a (Rec., 5064, 5087), as to these companies reduced one-third by the evidence of W. B. Doddridge (Rec., 4781), so that as to these two roads the assessments made by the assessing board were one-half of the expert's estimate of the real value, whereas in each of the other cases it was one-third of the actual estimate of value made by the board. Each statement presented by a railroad auditor likewise took the values so adopted by the state board. This was true as to the St. L. & S. F. case, Nos. 672-673 (exhibit 2, Rec., 4793), A. T. & S. F. case, Nos. 673-4, exhibit 45, (Rec., 4942), C. R. I. & P. case Nos. 678-81, exhibit 78, Rec., 5028), K. C. S. case, Nos. 682-3 (exhibit 87, Rec., 5066), M. K. & T. case, Nos. 690-91, exhibit 89, (Rec., 5068), K. C. C. & S. case Nos. 698-9, exhibit 93a, (Rec., 5087), C. B. & Q. case, Nos. 130, 134, exhibit 98, (Rec., 5092) and C. G. W. case, Nos. 700-701, exhibit 105, (Rec., 5109).

The earnings of several roads for several different years appeared (Ex. 1, Rec., 1230; Ex. 5b, Rec., 2386; Ex. 4, Rec., 3328; Ex. 42, Rec., 4790; Ex. 45, Rec., 4939; Ex. 78, Rec., 5028; Ex. 87, Rec., 5066; Ex. 89, Rec., 5065; Ex. 93, Rec., 5082; Ex. 98, Rec., 5090; Ex. 106, Rec., 5106), as well as the stock and bonded indebtedness of all, to which reference has just been made, and with which comparisons can be made.

(e) A new line of the C. B. & Q. was in 1904 and 1905 built in Missouri, between Mexico and Old Monroe, and, exclusive of

terminals and equipment, cost in cash $45,867.05 per mile (Ev. Fisher, Rec., 842). In 1907 the C. R. I. & P. built 300 miles of road between St. Louis and Kansas City. Without the city terminals and with a very small amount of equipment, this cost in cash $50,000 to $70,000 per mile (Ev. Frank Nay, Rec., 4690, 4691, 4696). An expert of great experience (Doddridge, Rec., 1578, 1579, 1605, 4463, 4468, 4490, 4491, 4463, 4668, 4780) testified that, without terminals or equipment, it would cost $40,000 per mile to build one of the lines in Missouri, and that with the exception of the K. C., C. & S. and St. L. & H., each road in Missouri was worth three times the amount of the assessment of the state board. These two roads were in his opinion actually worth twice the amount of the assessment. Upon these undisputed facts the value was found. Frank Nay (Rec., 4689-4690) testified that the value of the C. R. I. &. P. was not less than three times the amount of the assessment.

Statements of earnings and expenses, mileage, bonded debt and capitalization of many of the roads (Ex. 1, Rec., 1230; Ex. 5b, Rec., 2386; Ex. 4, Rec., 3328; Ex. 2, Rec., 4790; Ex. 45, Rec., 4939; Ex. 78, Rec., 5028; Ex. 87, Rec., 5066; Ex. 89, Rec., 5065; Ex. 93, Rec., 5082; Ex. 98, Rec., 5090; Ex. 106, Rec., 5106) were exhibited, and were the subject of comparison, each with the other and each with the C. B. & Q. which was the greatest earner per mile of all.

Upon the other hand the state, with its oral testimony, refused to fix a value. Its chief expert (Taliaferro, Rec., 4573), testified:

> "Q. Now let us see about the value of the property; whether the value over the bonded indebtedness be assigned and divided between state and interstate, or whether the whole value of the property, regardless of bonds, be taken, it must in some way be divided between state and interstate; that is, the return upon it, must it not? A. Yes, sir.
>
> Q. Have you any fixed notion of what the return ought to be upon the full value? A. What, rate?

Q. Yes. A. No, sir.

Q. That is, speaking for the State of Missouri, there is no figure of return you are willing to concede us? A. No, sir.

Q. Have you any fixed idea of value upon which we can get a return, or that we are entitled to get this return, which you have not fixed in your mind? A. You mean what the property is worth?

Q. Yes? A. No, sir.

Q. You are the chief representative and the chief expert of the state, and you have not a figure to tell us what sum ought to stand as representing the value of the property, upon which we are to get a return, or the rate of interest we are to receive thereon; that is a fact, is it? A. That is a fact."

Again (Rec., 4579):

"Q. Let us see now about the return on the property. We have a vast property here, some 1700 miles of railroad, and within three months, without any allowance for extra cost, without a penny's allowance for extra cost, one way or the other, we have a return of $80,000 for the passenger part of the state, of those 1700 miles of road. Are you willing to give us a figure that the state says shall represent the value of those 1700 miles of railroad, upon which we are entitled to some return from the passenger service? A. I could only refer to the fact, that as I understand it three times the assessed valuation is the value.

Q. Will the state give us that as the valuation for the purposes of this case? A. I do not know.

Q. Have you anybody among your experts that can give us the figure that the state will allow us? A. We could tell you what three times the assessed valuation is.

Q. I understand that. But, Mr. Taliaferro, the state has passed a law fixing the passenger rate at 2 cents per mile, as the maximum, which we say takes our property away from us. Now, manifestly, the men who passed that law ought to have had some idea of what return they were going to allow on some kind of an investment. You would say that, wouldn't you? A. I would assume that to be true.

Q. You, as the state's expert, can you give us any idea of the amount which you are going to allow us a return upon our passenger business? A. No, sir."

Again (Rec., 4591):

"Q. Now, maybe this will help you some. You give here the assessed valuation of the property, including the franchise, at $20,000,000. Three times that figure would be $60,000,000, representing the value of the property. Don't you do that in this statement of yours? A. We assume that, yes.

Q. Will you let that stand for the purposes of this case, as to the value of the property, upon which we may get a return, leaving it to the court to make the distribution? A. I don't see that that is anything for me to let stand or take out.

Q. It is in your statement? A. Yes, sir; it is in there.

Q. Did you put it in as representing the value of that property? A. *We put it in as being in accordance with what was referred to by you as a stipulation in these cases.*

Q. You are not willing to say that the court may take that as the fixed value? A. No, sir.

Q. And you are not willing to fix a figure that the court may take? A. No, sir.

Q. You are not willing to say whether it shall be $10,000,000 or $60,000,000? A. No, sir."

These statements though made in the St. L. & S. F. case were by the witness said (Rec., 4673, 4697, 4706, 4767) to be applicable to the other cases. In these circumstances and upon this record, it is not probable that the court below will be put in error upon account of the total valuation of the property. For as said by Judge McPherson (Rec., 5302) in his opinion:

> "There is no evidence that any of the existing bonds were improperly issued either as to amounts or rates of interest. In fixing the value the court has considered the evidence of witnesses as to the stocks and bonds outstanding,

and the court has considered the evidence of the fact that the Missouri State Board for taxing purposes has valued these properties. Of course those findings are not binding nor conclusive, but they are persuasive. But independently of stocks and bonds, and independently of what the State Board has valued these properties for taxing purposes, the evidence shows the valuations to be as recited in the findings of fact herewith filed, and to which reference will be made in the decrees."

These recitals as to the bonds were repeated in finding 9, Rec., 5310).

It is fair, therefore, to assume that the total value in the state has been properly found, and has been accepted as correct by both parties. The railroads were willing to risk their cases upon these values. Everyone knew that if they attempted to prove more the state officers would raise their tax assessments. Upon the whole both parties accepted these valuations. For the purposes of the cases they should be treated as conclusive.

(f) The question of value together with the finding, and the evidence in support thereof has thus been considered. In a supplemental brief it was, at the former hearing, contended that the valuation was excessive because it included the value of the franchises. As a matter of fact, it was not included, although, if it had any value, there should have been allowance therefor. The particular point made was this: The valuation was fixed by simply adopting the value estimated by the State Board, and under this law there was included the franchise value. The Missouri law requires certain specific property to be listed and assessed by the State Board, and then provides for a lump assessment "of all other property." Counsel erroneously assumed that this included the franchise, the value of which should now be fixed and deducted.

The whole argument proceeds upon the erroneous idea that the court below simply adopted the value as fixed by the State Board. This is not true, in point of fact, because the court in finding 11, (Rec., 5311) said:

> "But, aside and apart from the valuations thus fixed by the State Board, these findings are that upon the whole evidence, said properties are at least of the values above fixed."

Had a franchise value existed, it would, as already seen, have been a proper subject of consideration. There was no franchise value for a steam railroad organized under the laws of another state and permitted to do business in Missouri, to be there taxed. The proof of witnesses as to value was wholly independent of any such consideration. Moreover every statement of the state's expert and the report of the state's theories by the joint experts (Rec., 175-212) included that which is now sought to be deducted.

3. How the Assignable Value Shall be Found.

(a) Having ascertained the total value of all the property in the state, devoted to all uses, the next step is to find what part of this value is properly assignable to the classes of traffic in question.

(b) The only way in which to make this ascertainment is by taking such proportion of the entire value as the earnings from that class of business which is in question bears to the entire revenue in the state from all sources. Mr. Justice Van Devanter when Circuit Judge, adopted this view (*In re* Arkansas Rates, 163 Fed. Rep., 141). Upon final hearing of that case (187 Fed. Rep., 290, 317-320) Judge Trieber adhered to that view, among other things saying:

"What basis should be adopted for the purpose of apportioning the valuation of the property to each of the two classes of earnings, the state and interstate, in order to enable the court to determine whether the earnings of the railroads from its intrastate business under the rates established by the State Railroad Commission are compensatory? As the issues in these cases involve the entire intrastate business in the state of Arkansas, freight as well as passenger, it is immaterial how the valuation of the property is apportioned between the freight and passenger service. After ascertaining the proportionate net earnings from all sources of the intrastate business, it can be ascertained what they yield on the entire investment, as apportioned between the state and interstate business, and the main issue involved, whether the rates are compensatory or confiscatory, satisfactorily determined. * * * In estimating the value of property, its net income, if not the most important, is certainly a very important factor. A building in New York City is valued much higher than a building exactly like it, and the erection of which cost the same price, situated in Little Rock. The reason therefor is that the income from its rentals is much higher in the former city than in the latter. So a building in Little Rock, or any other city, on its main business street, is of much greater value than if standing in the suburbs, although both buildings may be exactly alike, put to the same uses, and cost the same. That the same rule should and does apply to railroads is shown by the market value of the stocks. While the share of a railroad whose earnings enable it to pay a 6 per cent dividend annually will command a premium on its face value, those of a railroad earning no dividends, and whose income is barely sufficient to earn the fixed charges, are practically worthless, or will sell for a very low price, and that only on speculative grounds. Take two roads, one in a level country, with practically no grades, inexpensive to maintain, and constructed, by reason of these facts, at a low cost, while another road, built in a mountainous, rocky country where it was necessary to do a great deal of expensive blasting of rock, building tunnels, with heavy grades and many curves. The latter road cost probably three or four times as much to build as the former, yet, owing to the level grades, absence of sharp curves, and more productive lands along its line, the earnings of the former are much greater than of the latter. Not only that, but, owing to the grades, the one road can carry only half

as many cars as the other. The consumption of fuel, and added to these the greater outlay for wages to employes, cause expenses to be so great as to leave small net earnings for that road whose cost was greatest, while the net earnings of the other are sufficient to pay large dividends. Can there be any doubt that the value of the first will be much greater than the latter, and that its shares will sell for a much higher price? The value of every investment or property is measured, to a large extent at least, by the value of its use, not by its use divorced from its value. The value of a railroad for taxation, it has been uniformly held by the courts, may properly be determined by the value of its bonds and stocks. Without citing the numerous cases decided by the courts, both state and national, approving this method of assessing railroad, telegraph, and other property of this nature, the following may be referred to: *State Railroad Tax Cases*, 92 U. S., 575, 23 L. Ed., 663; *Kentucky Railroad Tax Cases*, 115 U. S., 321, 6 Sup. Ct., 57, 29 L. Ed., 414; *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S., 530, 8 Sup. Ct., 961, 31 L. Ed., 790; *Pullman Co.* v. *Pennsylvania*, 141 U. S., 18, 11 Sup. Ct., 876, 35 L. Ed., 613; *Columbus, Southern Railway Co.* v. *Wright*, 151 U. S., 470, 14 Sup. Ct., 396, 38 L. Ed., 238; *Pittsburgh, etc., R. R. Co.* v. *Backus*, 154 U. S., 421, 14 Sup. Ct., 1114, 38 L. Ed., 1031; *Adams Express Co.* v. *Ohio*, 166 U. S., 186, 17 Sup. Ct., 604, 41 L. Ed., 965), where the court said: 'Whatever property is worth for the purpose of income and sale, it is worth for the purpose of taxation.' And this is the rule sanctioned by the Supreme Court of Arkansas. *Wells Fargo Express Co.* v. *Crawford County*, 63 Ark., 576, 40 S. W., 710, 37 L. R. A., 371. This is evidently the rule recognized and acted on by the railroad assessing board of the state of Arkansas, as shown by the evidence in this case. The main line of the Iron Mountain Railroad is practically a water-level road—no mountains to cross, no rocks to blast or tunnels to excavate, and the leading commercial cities and industries of the state along its line. On the other hand, the White River branch of that road was the most expensive road ever constructed in the state. Miles of it had to be cut out of rock, and tunnels cut through rocky mountains. There are no large cities along its line, and the country but sparsely settled. Owing to the heavy grades and the many curves, made necessary by the topography of the country, it cannot possibly carry as many cars to a train and transport freight as economically as the main line. The state

officials, charged by law with the duty of assessing the property, must have taken these facts into consideration when they assessed these railroads. The White River branch, in spite of its great cost, was in 1907 valued by that board at $19,000 per mile, and assessed on the basis of 50 per cent of its value at $9,500, while the main line was valued at $45,000 per mile, and assessed at 50 per cent of that sum, at $22,500 per mile.

For these reasons, the earning capacity of a railroad is the most important factor to be taken into consideration in determining its value. As shown above, it has been taken into consideration by the assessing officers of the state, and should be taken into consideration for the purpose of determining the apportionment of values in this case. If, by reason of the higher rates allowed by the state tariff, the net earnings of the property are increased, the value of the property is correspondingly increased, and the assessment for taxation made accordingly."

This view was also adopted in one of the most recent of the cases, Judge Hook (*M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493, 497), saying:

"When the railroad within the state is used in both interstate and local commerce it is necessary next to determine what part of its value should fairly be considered as devoted to each use separately, because obviously the company should not exact such excessive rates for local traffic as will also produce a return upon a value employed in a business over which the state has no control. Neither class of traffic, interstate or local, should be made to bear a burden caused by paring the rates on the other to the quick. It is generally agreed that, given the entire value of the railroad property in the state, it is fair to apportion it among the different kinds or classes of business upon a revenue basis, that is to say in proportion to the gross revenue produced by them respectively. And a like rule applies when the questions involved require separate consideration of the freight and passenger business. In this way will be found the fair proportion of value devoted to each particular use, upon which the owner is entitled for such use to a reasonable return. Counsel for defendants object to this method of assigning values, and the observations of Mr. Justice Brewer in the Tompkins

case (176 U. S., 175-7) are quoted to show its inaccuracy under stated conditions. But it seems to have been adopted by him previously in the Nebraska case (64 Fed., 165, 179) affirmed in *Smyth* v. *Ames, supra,* and by the courts generally in subsequent cases. Moreover it is not perceived that the ton mile basis advocated on its part, is free from similar criticism. The number of tons hauled one mile has no bearing upon the value of the property employed save as revenue is produced, and when that element is recognized we are at once at the revenue basis. The ton mile could not be used in the necessary assignment of values as to mail, express and miscellaneous service, nor as between passenger and freight traffic. Passengers are not transported by weight and the passenger mile and the ton mile as units of measurement cannot be reduced to a common term. In these cases, therefore, the total value of the railroad property in Oklahoma of each complaining company, viewed in all its aspects, should be apportioned according to the rule mentioned, and assigned separately to interstate and local business, to freight and passenger business, and to mail, express and miscellaneous business, so the effect of the contested rates may be ascertained."

Upon appeal of this case (185 Fed. Rep., 321, 328-330, 107 C. C. A., 403) Judge Sanborn said:

"Each railroad company was entitled to a fair return upon the value of its property in Oklahoma devoted to the public use. What return it actually received, and what it would probably continue to receive, under the fare and the rates in question, was ascertainable only by finding what percentage of the value of its Oklahoma properties devoted to its intrastate passenger business in Oklahoma and what proportion of the value of its Oklahoma property devoted to its intrastate freight business in Oklahoma the respective net incomes from those classes of business were and would be. But the Oklahoma property of each of these companies was used in common to transport passengers and freight in both interstate commerce and intrastate commerce; hence it became necessary for the court below, after it had found the value of the Oklahoma property of each of the companies, to divide

that value on the most equitable and available basis between its interstate business and its intrastate business and between its passenger business and its freight business, and complaint is made that it apportioned this value on the revenue basis—that, for example, it assigned to its intrastate business in Oklahoma such a proportion of the value of its Oklahoma property devoted to the public use of transportation as the gross earnings of its intrastate business in Oklahoma bore to the gross earnings of all its business in Oklahoma. The only other basis of division that was available under the evidence in this case was the ton mile and passenger mile basis—to assign, for example, to each company's intrastate business in Oklahoma such a portion of the value of its property in that state as the aggregate ton miles and passenger miles in the intrastate business bore to the aggregate ton miles and passenger miles in all its business in that state; and the real issue between these bases, therefore, was whether the apportionment of the value of the property should be made on the basis of the value of the use of it, or on the basis of its use without regard to the value thereof. The former method seems to be the more reasonable and equitable. Capitalization is founded on the worth of use, not on mere use alone. The value of property, of investment in every form, is measured by the value of its use, not by its use divorced from the value thereof. Railroad rates are founded primarily on the worth of the use of the railroad machine by the various classes of freight and by the passengers, and not on the amount of the use only. The rate for hauling a ton of merchandise of the first class one mile is not many times the rate for hauling a ton of merchandise of one of the lowest classes the same distance, because the former ton uses the railroad property many times as much as the latter, but because the use by the former is worth more than the use by the latter. There is no unit of measurement between ton miles and passenger miles. The ton mile and passenger mile basis gives no effect to the pregnant differences between classes of loads, or between the distances they are hauled. It is inapplicable to the assignment of values to the mail, express, and miscellaneous business. In fact there is no proportioning or measuring relation between the various uses of property and its value when no regard is given to the values of the uses. On the other hand, the values of the uses of property, which its gross earnings substantially represent, present a natural and logical

basis for apportioning its value to these uses. Cases may indeed be imagined, one of them was suggested by Mr. Justice Brewer in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Tompkins,* 176 U. S., 167, 176, 20 Sup. Ct., 336, 44 L. Ed., 417, and many others of a similar character have been presented in the briefs of counsel, in which the results obtained upon this basis from the particular facts assumed do not seem to be perfect. But no basis has been suggested that produces a perfect result. It may be that none exists that will produce such a result in all cases. But the facts that the ton mile and passenger mile basis has no common unit of measurement, that it excludes the effect of the differences in the classes of freight and in the distances it is hauled, which are reflected in the revenue basis, that there is no proportioning or measuring relation between the value of property and its uses divorced from their values that the revenue basis appeals more persuasively to the reason than any other suggested, and has commended itself to the judgment of, and has been adopted generally by, the courts upon whom duties of apportionment of this nature have been imposed in like cases, have convinced that the court below committed no error by its use. *Ames* v. *Union Pacific Ry. Co.*, (C. C.), 64 Fed., 165, 170; *Chicago, Milwaukee & St. Paul Ry. Co.* v. Tompkins (C. C.), 90 Fed., 363, 370; *St. Louis & S. F. R. R. Co.* v. *Hadley* (C. C.), 168 Fed., 317, 348-352; *Northern Pacific Ry. Co.* v. *Keyes,* (C. C.), 91 Fed., 47, 56, 57; *In re Arkansas Railroad Rates* (C. C.) 163 Fed., 141, 142."

This court refused *certiorari* (218 U. S., 675; 220 U. S., 618), thereby approving the result. Judge Sanborn in *Shephard* v. *Nor. Pac. R. Co.,* 184 Fed. Rep., 765, 810-812, thus dealt with the subject:

"The master divided the values of the Minnesota properties between freight and passenger business and between interstate business and intrastate business on the basis of the respective gross earnings of these classes of business. Counsel for the defendants challenge this basis of division and contend that the apportionment should have been made on the basis of the use made of the property by each of these classes of business, measured either (1) by the aggregate number

of the ton miles and passenger miles of the respective classes, or (2) by the aggregate number of the car miles and engine miles of these classes. They say that if that proportion of the value of the property of a company which the number of ton miles hauled by it in Minnesota bears to the aggregate of its ton miles and passenger miles in Minnesota be assigned to its freight business, and that proportion which its number of passenger miles bears to the same aggregate be assigned to the passenger business, and if that proportion of the value thus assigned to the freight business which the aggregate of the car miles and engine miles appertaining to the intrastate freight business bears to the car miles and engine miles used in the freight business be assigned to the intrastate freight business, and the same method be pursued in apportioning value to the intrastate passenger business the apportionment will be more equitable and just. The issue is between apportionment by use without regard to the worth or value of the use and apportionment according to the value of the use. The latter basis seems to be more logical and rational. Capitalization is founded on the worth of use, not on mere use. The value of property and of investment in every form is measured by the value of its use, not by its use divorced from the value thereof. The Minnesota Railroad Commission, the railroad companies, all rate makers, base their rates primarily on the worth of the use of the railroad machines by the various classes of freight and by the passengers, and not on the amount of that use. The rate for hauling a ton of merchandise of the first class a mile is not five times the rate for hauling a ton of merchandise of class E a mile, because the former ton mile uses the railroad property five times as much as the latter, but because the use by the former is worth more than the use by the latter. Moreover, there is no unit of measurement of ton miles and passenger miles, of freight car miles and freight engine miles, or of passenger car miles and passenger engine miles, divorced from the values of the uses they make of the railroad property, from the classes of loads they carry and the distances these loads are hauled. Indeed, there is no proportioning or measuring relation between such varying uses of property, when no regard is given to the values of these uses. On the other hand, the values of the uses, the earnings of the property, unavoidably condition the value of the property used, and present a natural and equitable basis of apportioning that value to these uses. Cases may indeed be imagined

in which this basis does not produce persuasive results. One of them was suggested by Mr. Justice Brewer in *Chicago, Milwaukee & St. Paul Ry Co.* v. *Tompkins*, 176 U. S. 167, 176, 20 Sup. Ct. 336, 44 L. Ed. 417, and others of like character have been presented in argument by counsel. But no basis has been suggested and none has been discovered which seems to be more equitable or more accurate. It may be that there is no basis or method that brings perfect or ideal results. But because the ton mile and passenger mile basis has no common unit of measurement, because that basis and the car mile and engine mile and the passenger car mile and passenger engine mile bases exclude the effect of the values of the uses made of the railroad property by the various classes of freight and by the passengers carried, because there is really no proportioning relation between uses divorced from their values and the value of the property used, because these bases ignore the difference in the classes of freight carried and in the distances they are hauled, because the apportionment of the value of railroad property on the basis of the gross earnings of the classes of business, which disclose approximately the values of their uses of it, gives effect to these material differences, appeals more persuasively to the reason and produces results more equitable than any other basis suggested and because this basis has commended itself to the judgment of, and has been adopted by, the courts upon whom duties of apportionment of this nature have been imposed in like cases, the master was justified in following their decisions and his action and report in this regard is confirmed."

This method of division was also adopted by Mr. Justice Brewer (*Ames* v. *Union Pacific*, 64 Fed. Rep., 165, 179), Mr. Justice Harlan (*Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819), Judge Carland (*C. M. & St. P. R. Co.* v. *Tompkins*, 90 Fed. Rep., 363) and by the Supreme Court of Florida (*State* v. *Atlantic Coast Line*, 40 Fla., 146, 37 So. Rep., 657).

The text writers so state the law (Beale & Wyman on Railroad Rate Regulation, Sec. 466). So in Nevada, Judge Farring-

ton (*Southern Pacific R. Co.* v. *Bartine*, 170 Fed. Rep., 725, 751, 752) said:

> "A reasonable return on this valuation should be required from the whole Nevada business done on the Central Pacific Railway, and only a fair proportion thereof from the intrastate freight traffic. The gross receipts of the company from all sources in Nevada during the year 1907 were $12,005,-443.23. The total receipts from intrastate freight were $159,-791.40, or 1.33096+ per cent of the gross receipts. Intrastate freight may therefore be charged with 1.3309+ per cent of $66,253,187.21, or $881,763.67."

In *Ames* v. *Union Pacific*, 64 Fed. Rep., 165, 179, Mr. Justice Brewer said:

> "We must take such proportion of the gross investment in the roads as the present earnings from local freights bear to the total earnings of the road."

In *C. M. & St. P. R. Co.* v. *Tompkins*, 90 Fed. Rep., 363, 370, Judge Carland said:

> "No court as yet has promulgated any rule as to how this court shall arrive at a true and just valuation upon which to figure local earnings. In the absence of any such rule this court believes that it is fair and just to first ascertain what per cent of the total gross earnings in any one year the total local earnings are for that year, and having ascertained that per cent, to take the same per cent of the total value of the property as a fair value upon which to fix local earnings."

Upon this subject, Judge McPherson below, in finding 16 (Rec., 5315) said:

> "* * * of the value of that portion of the property assignable to the particular traffic. This value is found by

taking for each class of business of the entire value of the property in the state, such proportion as the earnings on that portion of the business bear to all the earnings in the state."

(c) Little objection can be made by the state upon this score, because C. S. Ludlam, the state expert who dealt with the question (Rec., 2026) said:

"If I made a division, I think I would apportion it on the basis of the gross revenue."

Moreover, each statement submitted by the state's experts (Exhibits 61, 64, 76, 78, 80, 81, 85, 86, 91, 92, 103, 104, Rec., 4984, 4988, 5022, 5025, 5040 5042, 5057, 5060, 5079, 5081), and the combined statement of the four experts selected by consent (Rec., 174) clearly show (Rec., 175-212) that method of division. So do all the statements made by the railroads (Exhibits 2, 45, 78, 82, 87, 89, 93, 93a, 98, 106; Rec., 4790, 4937, 5026, 5043, 5050, 5060, 5080, 5082, 5090, 5106).

Mr. Taliaferro (Rec., 4673), in speaking of the assignable value, said:

"Q. In these statements you make no allowance whatever upon the question of interest or interest charge? A. No, sir, we used merely the three-times the assessed value figure, where we made any calculations at all."

Again (Rec., 4670), he said:

"Then we have taken the state earnings on the three bases, and deducted the operating expenses, and show what the remainder would amount to on the portion of the property employed in doing the state passenger business, using

the gross earnings as a basis for dividing the assessed value of the property—that is, three times the assessed value of the property. The exhibit is on exactly the same lines as Exhibit 61, introduced in the Frisco case."

(d) The findings (Finding 17, Rec., 5315-5316) tabulate the percentages of every class of earnings as to the companies whose cases were tried, so that if to the value found (Rec., 5311) the percentage be applied, there can readily be determined the assignable value of the property devoted to the use of any particular class of business. These percentages of state carriage to all earnings (Finding 17, Rec., 5316, 5317) are:

Case Nos.	Road	Freight %	Passenger %
672-3	St. L. & S. F.	14.26	14.79
674-5	A. T. & S. F.	5.10	3.77
678-81	C. R. I. & P.	13.58	10.33
682-3	K. C. So.	3.70	3.05
684-5	St. L. & H.	41.84	25.05
690-1	M. K. & T.	12.04	10.70
130-4	C. B. & Q.	12.83	13.09
698-9	K. C. C. & S.	15.80	16.73
700-1	C. G. W.	7.45	9.75

By applying these percentages to the values found as already stated, there can always be found the assignable value upon which a return is to be h

(e) If, however it is decided to add miscellaneous business, divided as the state claims it should be, the assignable proportions to be added to the freight and passenger percentages clearly appear in request 22 (Rec., 157-166). They are, however, not such as to affect the result. They leave exactly the same result when the earnings and expenses are added and deducted upon the basis upon which the statements proceed.

4. RATE OF INTEREST TO WHICH THE COMPANIES ARE ENTITLED.

After having ascertained the value of the assignable proportion, the next question is as to the rate of return thereon to which the owner is entitled.

(a) This question was considered below (Finding, Rec., 5312; Opinion, Rec., 5302; *St. L. & S. F. R. Co.* v. *Hadley*, 168 Fed. Rep. 317) where six per cent was adopted as the least rate to be allowed. This was the rate held proper in *Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 53 L. Ed. 383, 398, in the Pennsylvania two cent fare cases (*Penn. R. Co.* v. *Philadelphia Co.*, 220 Pa., 100; 68 Atl. Rep. 676, 679; *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep., 342) and in a recent New York case (*People* v. *State Board*, 196 N. Y., 39, 89 N. E. Rep. 581, 587, 128 App. Div. 13, 112 N. Y. Supp. 392, 394, 395). In the recent Oklahoma case (*M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep. 493, 501, 502) Judge Hook said:

> "Rates should be just both to the public and the owner of the railroad (*Smyth* v. *Ames*, 169 U. S., 466, 544). It does not appear in these cases that the roads were ill conceived, greater in extent than they should be, unduly expensive in construction, or that they are not operated wisely and economically. It therefore does not seem that rates producing no more than a reasonable return on their fair value could be unjust to anyone. In fixing the measure of return upon property devoted to public use regard should be had to the character of the business, the locality and the risk; whether the return will be uniform and secure; whether the patronage is steady or fluctuating and quickly responsive to financial and commercial changes; interest rates legal and contractual and the rates customarily sought and required in like investments in the locality; if a railroad, the character of the traffic, whether largely of a kind dependent upon uncertain conditions or so diversified that causes affecting part will not greatly affect the whole. The return should be

a fair, just and reasonable one, and not so meager as to repel investment in the property or to embarrass the owner in operating it. In *Wilcox* v. *Consolidated Gas Co.* (212 U. S., 19), the business was that of a gas company in New York City where interest rates are generally the lowest. It dealt in one of the necessaries of urban life. The supreme court observed that the risk was reduced almost to a minimum, that the company had a monopoly of the gas service in the largest city in America, secure from competition, and said: 'Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use.' In a preliminary announcement of the conclusion of the court Mr. Justice Peckham said: 'There is no rule as to any particular rate which any corporation subject to legislative control in the matter has a right to obtain without legislative interference. It depends upon circumstances and locality.' The present needs of the cases in hand require no further expression than that the returns to the railroad companies shown by the proofs are clearly deficient."

Upon appeal (185 Fed. Rep., 321) and certiorari (218 U. S. 675, 220 U. S., 618) this result was sustained. In *Shephard* v. *Nor. Pac. R. Co.*, (184 Fed. Rep., 765, 815, 816) seven per cent was sustained, Judge Sanborn saying:

"Complaint is made that the master finds that the companies are entitled to a net return of 7 per cent per annum upon the respective values of their properties devoted to this public use. The character of the business in which an investment is made, the locality in which it is placed, the returns secured in that locality from other investments of a similar nature, the uniformity and certainty of the return and the risks to which the principal and the income from it are subjected condition the measure of a fair return upon the capital invested. An investment in a bank, in a factory, in a mercantile, manufacturing, or agricultural business, is substantially free from regulation by the government and exempt from any duty to the public except that of paying taxes. If the business in which such an investment is made is unprofitable, its owners may promptly discontinue its operation until more prosperous days

come and then return to their undertaking. An investment in a railroad which operates in many states is subject to the regulation of its business by many governments. Its owners owe the duty to the governments and to the public to operate their railroad continually in days when its operation is unprofitable as well as when it is remunerative, a duty they must discharge under the penalty of the forfeiture of their property if they fail. In view of these facts, they ought to be permitted to receive a return large enough to enable them to accumulate in prosperous days a surplus sufficient to enable them to protect their property in days of disaster and to make their average return through days of prosperity and adversity fair and just. The lands in Minnesota through which these railroads extend are fertile and productive. The cities, villages, and towns they reach are rapidly increasing in population and wealth, and the people they serve are thriving and successful. The evidence satisfies that the railroads are maintained in excellent condition, that they are efficiently and on the whole economically managed and operated, and are rendering commendable service. Justice to the thriving people they serve does not require that the owners of these railroad properties should be deprived of a fair return upon their values. To deprive them of such a return would prevent advances and tend to compel reductions in the wages and salaries of their employes, would tend to prevent the extension of their lines into portions of the state where the development and accommodation that railroad service assures would be welcome and may be needed, to deteriorate the character of the service they render, and to retard the general prosperity. The legal rate of interest on a debt in Minnesota, in the absence of contract, is 6 per cent, and by contract it may be 10 per cent, per annum. Rev. Laws Minn. 1905, § 2733. Rational investments in agricultural, manufacturing, mercantile, and other industrial pursuits, and even well-secured loans, yield returns in Minnesota corresponding with these lawful rates. Investments in railroads and the returns thereon are at the risk of failures and partial failures of crops, of the disasters, delays, and expenses of unusual storms, snow, and cold, of the great financial disasters which occasionally prevent or delay the movement of traffic, and of the burden of continuous operation whether profitable or unremunerative. It is an axiom in economics that the greater the risk the greater must the return be upon invested capital, and the conclusion is irresistible that a net return of 7 per cent. per annum upon the respective values of

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the properties of these companies in Minnesota devoted to transportation is not more than the fair return to which they are entitled under the Constitution of the United States."

In *In re Arkansas Rates* (187 Fed. Rep., 290, 345, 348), Judge Trieber sustained 7.5 per cent saying:

"Ought not all these matters be taken into consideration, and provision made for emergencies which experience teaches the roads are at all times subject to and which at any time may occur? To provide for these the court is of the opinion that, in addition to the 6 per cent earned when everything is prosperous and no extraordinary losses by casualties have been sustained, an allowance of 1.5 per cent additional for a surplus fund should be made."

In *People* v. *State Board of Tax Commissioners*, 196 N. Y. 39, 89 N. E. Rep. 581, 586, 587, it was said:

"Having ascertained the entire net earnings, the problem before the referee was how to fix the proportion of such net earnings which were attributable to the enjoyment of the special franchise. Taking the value of all the relator's tangible property as fixed by him, he computed interest thereon at the rate of 5 per cent, and deducted the resulting amount from the total net earnings. 'The balance of the earnings' he says, 'after making this allowance for return on the investment in tangible property, results clearly from the ownership and use of the special franchise owned by the company.' He gives as a reason for deducting the rate of 5 per cent in the absence of any testimony as to the proper rate, that it was considered a fair return on the money invested. The Appellate Division, on the other hand, held that 6 per cent should be allowed as a fair return upon the capital invested in the real estate and other tangible property. In the case of *Wilcox* v. *Consolidated Gas Company*, already cited, the Supreme Court of the United States agreed with the District Court that the complainant was entitled to 6 per cent on the fair value of its property devoted to the

public use; and in a case like the present, where the net earnings rule is applied, we think that the court below might properly assume as a matter of general knowledge in the business community that a prospective return of at least the legal rate of interest, which is 6 per cent in this state, is requisite to induce investors to embark their money in enterprises of such a nature as that undertaken by this corporation. It is true that this is a question of fact, but the doctrine of judicial notice generally applies only to matters of fact. While evidence as to what constitutes a fair and reasonable rate of return in the business of a corporation was received in this *Consolidated Gas Co.* case (C. C.) 157 Fed. 849, 869, and may properly be taken by the court in *certiorari* proceedings under the tax law if the parties see fit to offer it, the court may in the absence of such evidence, adopt 6 per cent as a fair rate for the purpose of calculating the value of a special franchise under the net earnings rule."

In that case below, (128 App. Div. 13, 112 N. Y. Supp. 392, 394, 395,) Judge Kellogg said:

"It is common experience that a long-term bond, properly and amply secured, bearing 4 per cent, produces a fair return upon an investment, the safety of the principal of which is beyond question. The water company has no exclusive right to occupy the streets. The same privilege may be granted to another water company, and ruinous competition may follow. A public water plant may be established, or condemnation proceedings may be instituted to acquire the relator's property for public use. The prosperity of the relator is limited by circumstances and local conditions. Its rates and kind of service may be more or less within the regulation of the public. If by competition or otherwise its business is rendered unprofitable, its plant has little value for use elsewhere. It is evident that the stock of such a company, with such an uncertain tenure, to be marketable at par, should produce a greater return than a first-class bond. Perhaps, without discussing it, we may assume, until the evidence shall furnish us a better guide, that such a stock must earn at least 6 per cent in order to be worth par, or in order that the business may be considered profitable

or successful. If a water company can pay but 6 per cent upon the actual value of its tangible property, it is probable that the intangible rights which it has in the streets would not be very desirable and could not be considered as revenue producers. Such intangible property is given a value for taxation, because it is supposed to be earning an income for the company; but if the company earns no adequate return, with good management, such intangible rights have but little value. The intangible rights attach to the fixed property in the streets, and form the special franchise which is to be taxed; and if the business is a losing venture, and is not producing an income of at least 6 per cent, it is perhaps accorded a full value in treating the tangible property in the streets as producing equally with the other tangible property of the company."

In *Wilcox* v. *Consolidated Gas Co.*, 212 U. S., 19, 50, 51, 53 L. Ed., 383, 398, Mr. Justice Peckham said:

"Under the circumstances, the court held that a rate which would permit a return of six per cent would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily sought and obtained on investments of that degree of safety in the city of New York. Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to six per cent on the fair value of its property devoted to the public use."

In the Pennsylvania case (*Pennsylvania R. Co.* v. *Philadelphia County*, 220 Pa. 100, 68 Atl. Rep., 676, 679,) it was said:

"What was said in *Brymer* v. *Water Company* was that the company was entitled to a fair return not less than the legal rate of interest. In naming the legal rate, the court was naming a minimum, not a maximum rate. Six per cent is the legal estimate of the legitimate profit from the ordinary safe use of money. No business man in 1846, even if now, went into a new and extensive venture of uncertain outcome without the hope of more than common interest. Be-

cause his judgment or foresight was good is no reason that he should be shorn of his profits in the result. What is a fair profit is a complicated and difficult question; but there are certain elements that are plainly to be regarded to avoid injustice, such as the original investment, the risks assumed at that time, the returns as compared with other enterprises as nearly similar as may be, the cost of maintenance and improvement, the prospects of increase, and the present value in view of the preceding elements. Injustice is done by anything that fails to consider these and to deal equitably with the private as well as the public interests involved. It is not necessarily regulated by what others would now make the venture for under the present circumstances and with present knowledge."

In *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct. Rep. 342, it was said:

"If the plaintiff is entitled to measure its fair profit at a minimum of six per cent upon its investment, after payment of fixed charges, operating expenses, etc. (220 Pa. 115), the matter becomes free from that difficulty of investigation which would arise if the reduction still left the company in enjoyment of a percentage of profit on its capital exceeding the legal rate of interest. The burden of the company to prove it unfair against the usual presumption is satisfied when this can be shown, for I understand the meaning of the Chief Justice to be that as six per cent is the legal rate which a man may charge for the use of money in Pennsylvania it is judicially declared as a minimum rate of profit less than which the Legislature cannot *compel* him to take upon other investments of capital within the constitutional prohibition of injustice, and tending to confiscation, although voluntarily he may take less in both cases. His reference to what is a fair profit being a difficult and complicated question is predicated upon the conditions to be considered in cases where regulation reduces a larger rate to a point that is yet in excess of six per cent. In the case against Philadelphia County the estimated return was 5 1/10 per cent. But if I am mistaken, it does not affect this decree."

Finding 12 (Rec., 5312) below, recited:

> "The interest obligations except as already stated are just and reasonable and should be paid in full with some dividends to the stockholders in addition. However, and entirely aside from the question of interest, the rates and earnings should in any event be such as to produce a fair return upon the valuations hereinbefore fixed. And such earnings should be on the property within the state as would be equivalent to six per centum per annum, that per cent being a fair return upon such valuations."

Judge McPherson in his opinion (Rec., 5302) said:

> "The Supreme Court during the present year in the case of *City of New York* v. *Consolidated Gas Company of New York* (211 U. S. .....) decided that six per cent was fair and right to be given to the owners upon the true valuation. My opinion is that while a gas plant is in some respects different from a railroad, that a railroad property, properly built, and properly managed, should over and above expenses make a return of six per cent per annum.

Manifestly, if six per cent as a return upon railroad property should be treated as fair in the old settled and thickly populated state of New York and Pennsylvania, it would not be unfair in Missouri.

(b) At the rate of six per cent only upon assignable percentage of the valuations thus found, the returns to which each road was (Finding 19, Rec., 5318-5326) entitled from the state freight and passenger carriage business, exclusive of miscellaneous, and from both combined:

Case No.	Road.	Test Period	Freight	Passenger	Both
672-3	St. L. & S. F.....	3 months	$130,998.97	$135,857.42	$266,856.39
674-5	A. T. & S. F.....	6 months	23,089.35	17,068.16	40,157.51
678-81	C. R. I. & P.....	3 months	38,911.81	29,599.34	68,511.15
682-3	K. C. S.	6 months	8,923.38	7,355.76	16,279.14
684-5	St. L. & H.	12 months	28,694.05	17,179.40	45,873.45
690-1	M. K. & T.....	6 months	75,469.96	67,070.48	142,540.44
130-4	C. B. & Q.	12 months	409,325.04	417,620.02	826,945.06
698-9	K. C. C. & S.....	12 months	22,564.51	23,892.67	56,457.18
700-1	C. G. W.	6 months	8,057.70	10,545.32	18,603.02

The question then is whether the rates in question bring these figures as returns.

5. The First or Equal Division of Expenses Between State and Interstate Business Should be Upon the Revenue Basis.

(a) Having found then the amount of net returns to which the railroad company was entitled, it is next necessary to consider the earnings and expenses to ascertain whether there has been received the amount which, under the law, should have been returned.

(b) The earnings are fixed and were ascertained with certainty. So with the division of expenses among the different classes of business. The differences between the parties arise solely as to the division of expenses between state and interstate business, and as to how much more it costs to do the state than the interstate business. This clearly appears from the cross examination of the state's chief expert (Ev. Taliaferro, Rec., 4554-4598; 4767-4773).

As to the accounts of the St. L. & S. F. (Cases Nos. 672-3), Mr. Taliaferro, (Rec., 4573) said:

"Q. Now to put the thing plainly, and into a nut shell, so the plainest man can read it at a glance, so there may be no misunderstanding whatsoever,—if the revenue basis is right, in ascertaining the first division of cost as against expenses and in ascertaining the increased cost, then there is no criticism to be made upon our statement? A. And if the revenue basis is right for dividing the value of the property?

Q. Yes. A. No, sir.

Q. In other words, if the revenue basis for dividing the returns upon the value of the property is correct, and the revenue basis is right, as to the apportionment of expenses, our statement is correct and must stand? A. We have no criticism to make."

Again (Rec., 4580) he said:

"Q. Those figures have been in your hands here for months, haven't they? A. I have said we have no criticism to make of them.

Q. I want to know if they are correct. A. We have not checked them, I said.

Q. You have no criticism to make of them? A. We have no criticism at all."

Again (Rec., 4566), he said:

"Q. If the division of expenses, as we have made them, upon the revenue basis, is the theory adopted, there is nothing the matter with our account? A. We have no criticism upon that."

As to the accounts of the A. T. & S. F. (Case Nos. 674-5), he (Rec., 4671) said:

"Q. As to our exhibit 45, as a matter of fact last June we served upon the state a statement along the same lines

(a little bit different in figures) and when you or Mr. Hamilton came to check it up with the auditors of the Santa Fe you found some differences, and those were adjusted and then this exhibit 45 was prepared as representing the revised form? A. Yes, sir.

Q. So far as the Santa Fe Exhibit is concerned, those figures are all right? A. The earnings and expenses are all right.

Q. And the divisions and percentages, etc.? A. Of the gross?

Q. Of the whole thing. A. Between state and interstate?

Q. Mr. Taliaferro, I am not binding you to any admission that our division upon the revenue basis is right, but the point I want to make plain is what I think Mr. Conrad stated, that when the statement was prepared there was a difference of some few thousand dollars between what it is in Exhibit 45. When you experts came to check over the figures between you, you checked over all these differences and exhibit 45 revised is what you agreed to as the correct figures—not that you agreed upon the theories at all? A. Yes, sir, that is true, and, further, when we came to divide the expenses between state and interstate we did not check that division.

Q. You mean you did not stop to do the mathematical work? A. Yes, sir, that is, what I mean.

Q. You assumed that Mr. Conrad has correctly made the mathematical proportions? A. Yes, sir, I would do that.

Q. If there was any mistake of that kind a judge could find it out immediately, in the mere mathematical problems worked out? A. Yes, sir.

Q. Otherwise you took them as correct calculations? A. We made no use of them. If we were working on them we would have done that, but we did not use the figures on that basis.

Q. You had all the opportunity for examination in the Santa Fe that you had in the other cases? A. Yes, sir.

Q. And every courtesy was shown you and every facility extended? A. Yes, sir.

Q. And for the purposes of this case you have no criticism to make upon that? A. Not at all."

As to the C. R. I. & P. (Case Nos. 678-81) he (Rec., 4697) said:

"Q. The cross examination as to Exhibit 81 and 64 in the Frisco case, and as to exhibits 76 and 77 in the Santa Fe case, is applicable to this situation, with the exception of the figures you have compiled? A. Yes, sir, they are made on the same lines.

Q. And what we talked about as to the others would be applicable to these exhibits 80 and 81? A. Yes, sir."

In speaking of his own figures in the K. C. S. case (Nos 682-3), he (Rec., 4705) said:

"Q. The figures contained in those statements are taken in a large part from the statement filed by the Kansas City Southern, are they not? A. Yes.

Q. That is, as to earnings, expenses, and so on? A. Yes.

Q. And the division between state and interstate? A. Yes, sir."

Again (Rec., 4706), he said:

"Q. The same observation you made in cross examination as to exhibits 61 and 64 in the Frisco case, would be applicable to these exhibits? A. Yes, sir."

As to the M. K. & T. (Case Nos. 690-1) it was by counsel (Rec., 4722) said:

"Mr. Ladd: Our experts have not examined the books of the Missouri, Kansas & Texas Railway Company at all, or any of their accounts. We have here a couple of statements prepared by Mr. Taliaferro, using the figures contained in complainant's exhibit 89.

The Court: Presenting your theory of the case?

Mr. Hagerman: Corresponding to exhibit 61 and 64 in the Frisco case?

Mr. Ladd: I think, and if I am not right Mr. Taliaferro will correct me, that these exhibits exclude from the diminution in state revenue what would have been the diminution in interstate revenue on those certain commodities."

Figures of the St. L. & H. and K. C. C. & S. (Rec., 4712-4742) were agreed to be correct. No statements were made by the state's experts because as stated upon (Rec., 196, 207) the joint report of the experts appointed by the court:

"It is apparent from the results above shown that upon neither the revenue nor the ton mile and passenger mile theory of expenses can any adequate return on the investment be earned."

The figures of the C. G. W. (Rec., 4779) were not disputed, but actually used by the state in preparing its exhibits 108 and 109 (Rec., 5115-5120).

So as to the accounts produced by the C. B. & Q. Mr. Taliaferro (Rec., 4767-4768) said:

"Q. I want you to take with me, for a moment, exhibit 98, and see where we differ: Take first the earnings given there for passenger, state and interstate; there is no objection to that, is there? A. No, sir.

Q. That is correct? A. Yes, sir.

Q. So far as expenses are concerned, the grand total is correct? A. They are figures shown by the company's books, yes, sir.

Q. And so far as the division upon the revenue basis, as Mr. Sturgis made it, that division is correct? A. We have not worked that out.

Q. There is no objection to it? A. No objection to it.

Q. And so far as the percentages ascertained, there is no objection to those? A. No, sir.

Q. So I might say, if the division upon the revenue basis, as is stated here, is the right theory to be adopted, there is practically no objection to Mr. Sturgis's statement? A. Well, all I could say would be that we have not checked the figures. We might do it in the future.

Q. You haven't criticism to make of them now? A. No, sir; no criticism."

Again he (Rec., 4771) said:

"And then I take it you have not any criticism to make upon Mr. Sturgis' figures, if they ought not to be treated as whole? A. No, sir; because I would not know how to separate the expenses of mail and express from the expenses of handling passengers.

Q. And you have nothing to suggest along that line? A. No, sir."

Afterwards a separation of miscellaneous was made by the witness (Rec., 4773) and produced as exhibit 105 (Rec., 5105).

The court below spoke in no uncertain terms upon this subject. Finding 6 (Rec., 5309) recited:

"No difference of consequence has arisen between the parties as to the expense of doing the entire business in the state. With reasonable certainty the expenses for doing the freight and passenger, including miscellaneous of each, can be and have been separated. The earnings are known and fixed and in these findings stated to a certainty. But as to the expenses as between state and interstate business, there has been a controversy and such is the principal controversy in the cases. There is no known fixed or certain rule for determining how this separation of expenses shall be made The same cannot be made with mathematical certainty."

In the opinion (Rec., 5300-1), it was said:

> "The four accountants, Mr. Peabody and Mr. Johnson representing the railway companies, and Mr. Taliaferro and Mr. Hamilton representing the state, impressed me after hearing them testify and being in consultation with them for ten days after the cases were submitted, that the sole purpose of their work was to exhibit the truth, differing only as to extra cost, and that difference of extra cost largely confined to the local passenger traffic, and differing as to the theory as to how the expenses between local and interstate traffic within the state should be divided. *Aside from those two questions there is not the slightest variance between the testimony of the experts upon the two sides.*"

A comparison of the accounts produced by both sides clearly so shows.

(c) A very proper method of the first or equal division of expenses, as between state and interstate business, is upon the revenue basis. So that basis was fully considered below and was there held to be proper. It was that adopted by Mr. Justice Brewer (*Ames* v. *Union Pacific*, 64 Fed. Rep., 165; *C. M. & St. P. R. Co.* v. *Tompkins*, 176 U. S., 167; 44 L. Ed., 417), by Mr. Justice Harlan (*Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819) by Judges Thayer and Amidon (*C. M. & St. P. R. Co.* v. *Keyes*, 91 Fed. Rep., 47, 55), by Mr. Justice, then Circuit Judge Van Devanter (*In re Arkansas Rates*, 163 Fed. Rep., 141), by the Wisconsin Commission (*Buell* v. *C. M. & St. P. R. Co.*, 1907), by Judge Hook in the Oklahoma case (*M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493, 498, 499), and by Judge Sanborn upon appeal thereof (185 Fed. Rep., 321, 330, 331; 218 U. S., 675; 220 U. S., 618. In the Minnesota case (*Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep., 765, 810, 812) he did the same thing in principle as did Judge Trieber upon final hearing of the Arkansas case (*In re* Arkansas Rates, 187 Fed. Rep., 290, 320, 344).

Upon this subject, Judge Hook in the Oklahoma case said:

"Having the total value of the railroad property in the state, the gross revenue from all operations therein, the gross revenue from each class of business, interstate and local freight and passenger, and mail, express and miscellaneous, and the proportionate property values devoted thereto respectively, there must then be ascertained the net revenues from the local freight and passenger business so that their relation to the value of the property employed in producing them may be disclosed and the ultimate question answered, to-wit, whether the rates from which the net revenues come are reasonably compensatory. At this point arises the principal controversy. A substantial part of the expense of railroad operation is incurred indiscriminately in all its business. For example, the maintenance of way and structures in a state, which makes one of the most important general expense accounts, is almost entirely for the common benefit of all traffic, interstate and local, freight and passenger. As between freight and passenger traffic a large part of the expenses may be directly located and distributed, and it is the custom to apportion the remainder by various rules not necessary to mention here; but generally speaking it is impracticable in railroad business to separate expenses into the interstate and local and the minor and incidental operations. From the very nature of the case, therefore, some rule must be adopted for charging to each of them their fair and equitable proportion of the common expense. Of necessity it must proceed upon average conditions commonly known or shown to exist, and it argues nothing to say that it does not fully apply to this or that exceptional instance. A general rule based on experienced observations is fair, and what is lost by its application in one place is doubtless gained in another, and an equitable equilibrium maintained. Of those suggested the revenue basis appears to be much more uniform in its adaptability and much less subject to substantial objection. It has been frequently employed (*Ames* v. *Union Pacific*, 64 Fed. 165; *Smyth* v. *Ames*, 169 U. S., 466; *C. M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167; *Northern Pacific* v. *Keyes*, 91 Fed. 47; *In re Arkansas R. Rates*, 163 Fed., 141; *St. Louis & S. F. R. Co.* v. *Hadley*, 168 Fed. 317). It is the one to which the mind naturally turns in every problem involving the charging of common expense to different departments of a business. When a general or common expense cannot be located what is more obviously reasonable than to say in the first place the different branches or

department shall bear it according to the value of their products or their gross earnings, and then make due allowance for exceptional conditions if any are perceived? That seems at the start to satisfy the mind intent on equity. It is a working basis for the distribution of all expense incident to a railroad business among its revenue yielding operations of every character. On the other hand, the ton mile rule for which contention is made can be applied to nothing but the freight business. Besides being entirely useless as a distributor of expense to the mail and express business of a railroad and to the services of switching, demurrage, storage and the like, the ton mile rule is radically inaccurage when applied to the very business to which it is best adapted. It does not consider the differences and risks in the character of the freight transported, whether glassware or sand, furniture or coal; whether the freight is moved in carload or less than carload lots; whether the haul is long or short; the character of the traffic as regards time consumed in transportation and occupation of the track and equipment; the number of expensive handlings at terminals and terminal expense generally. The ton mile theory places interstate traffic while it is moving in the state upon the basis of local traffic and therefore ignores the effect of the external haul upon the internal cost. Concededly the average of haul of interstate traffic is materially greater than that of traffic wholly within the state and it is an axiom in transportation that the longer the haul the less the cost per ton per mile. These matters in the aggregate run enormously into the cost of freight transportation, but none of them are picked up or accounted for by the ton mile rule which rests on the erroneous assumption that the transportation costs the same per ton per mile regardless of character, time, distance or circumstance. The revenue rule is not ideal, but revenue is the products of rates and service, and, generally, in the making of rates some regard is had to the cost of service. In other words, earnings reflect to some extent the important differences in the cost of service which the ton mile rule entirely ignores."

Upon appeal (185 Fed. Rep., 321, 330; certiorari denied, 218 U. S. 675; 220 U. S. 618) Judge Sanborn said:

"In order to ascertain the net return from the instrastate passenger business and from the intrastate freight business of

each of these companies, it was necessary for the Circuit Court to find and deduct from the gross earnings of each of these classes of business the cost of doing that particular class of business. There were many items of the cost of doing all the business of the company in Oklahoma that disclosed the class of business on account of which they were incurred, and these are called 'allocated items.' But there was a large percentage of the cost of doing all the business of each of the companies in Oklahoma, like the cost of the maintenance of way and structures, which was incurred for the common benefit of its interstate business and its intrastate business, and there is no method of dividing these items of common cost between these classes of business which is sure to be mathematically accurate. Many methods have been and still are suggested. The question was: Which was the most equitable, the most likely to produce a fair and just division? And upon this subject there was much testimony of many witnesses, whose long experience in the practical operation of railroads, exceptional opportunities for extensive observation, and peculiar knowledge qualified them to form and express opinions. The circuit court examined all this evidence, considered the arguments of counsel, and adopted the revenue basis, and assigned these items of common cost to the classes of business in proportion to the gross earnings of these respective classes. Counsel now argue that there were other available methods, more likely to be fair and just, which they insist the court should have preferred. They now suggest (1) the ton mile and passenger mile basis; (2) the division of the items of common cost in the same proportion that the allocated items assigned themselves; (3) the subtraction of the aggregate of the items of common cost from the gross earnings of all the business, the division of the balance between the various classes of business according to their respective gross earnings, and the subtraction therefrom of the items respectively allocated to these classes. There is no basis of division that is free from objection and criticism. But the decisive preponderance of the evidence is that the revenue basis is the most likely to be just and fair. Much that has been said concerning the use of this basis for the apportionment of the value of the property is applicable to its employment for the division of items of common cost. No reasons for the use of either of the other bases that seem to us so cogent and persuasive as those given by Judge Hook at pages 498, 499, of 177 Fed.,

for his adoption of the revenue basis have been called to our attention or occur to us. The use of that basis is sustained by many decisions, and it cannot be held to be erroneous or mistaken. *Ames* v. *Union Pacific R. R. Co.* (C. C.) 64 Fed. 165; *Smyth* v. *Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; *Northern Pacific Ry. Co.* v. *Keyes* (C. C.) 91 Fed. 47; *In re Arkansas Railroad Rates* (C. C.) 163 Fed. 141; *St. Louis & S. F. R. Co.* v. *Hadley* (C. C.) 168 Fed. 317."

The same judge enlarged upon the argument in *Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep. 765, 810-812, in the quotation (*supra* subd. 3) heretofore made.

In *Buell* v. *C. M. & St. P. R. Co.*, (R. R. Co. of Wis. [1907], pp. 179, 180), it was said:

"When it comes to the apportionment of the expenses of either the passenger or the freight traffic in this state and between intra and interstate traffic the situation grows still more complicated. In this case an actual separation is, of course, out of the question. The best that can possibly be done is to find some unit or basis upon which some arbitrary division can be made that is equitable to all classes of the traffic. Such a unit, to be fair, must be so adjusted as to take into account the different conditions under which the transportation services were performed as well as the factors which governed the apportionment to the state. The question here is where can such a basis be found. Of the several units that have been discussed and upon which at least some of the various items of cost have been divided, there would seem to be none which is entirely free from objections. The one to which the fewest objections can be raised is perhaps the gross earnings basis. As has been shown already the gross earnings of the intra-state traffic were credited to the state for their full amount while gross earnings from the interstate traffic were credited to the state in the proportion which the length of the haul within this state bore to the total length of the haul. The earnings in this case also include the revenue from the high rate as well as from the low rate traffic and from both local and through

business. The operating expenses were in part actually allotted to the state and partly apportioned on such operating units as the train, car and locomotive mileage. A closer analysis of the facts shows that there is a fairly close relation between the methods upon which the earnings and expenses were allotted to this state, which in turn would suggest that the gross earnings might be a fair basis upon which to distribute the expenses between the intra-state and the interstate traffic. This suggestion is strengthened by other facts. As stated above, there are good reasons for maintaining that the local rates are so much higher than the through rates that the greater revenue from the former traffic will offset its extra cost. It has been further shown that this increase in the revenue affects practically all classes of the traffic to relatively about the same extent. It follows from this that there is a closer or more intimate adjustment between rates and expenses than might be expected. This is an important fact which tends to confirm what has already been said, that gross earnings constitute a fair basis upon which to allot expenses between the intra-state and the interstate business."

Mr. Justice, then Circuit Judge, Van Devanter (*In re Arkansas Rates*, 163 Fed. Rep., 141, 142) said:

> "Undoubtedly these differences furnish a standard by which to apportion the total cost between the traffic which is intra-state and that which is interstate. Other standards are suggested, but the proofs indicate that none of them is as satisfactory or accurate as is the difference in cost in its relation to the revenue."

The doctrine was asserted, enlarged upon and dealt with in detail upon final hearing of the *Arkansas Cases* (187 Fed. 290), where the freight expense was divided with some items upon a ton mile and others upon a revenue basis, and extra cost estimated at 210 to 250 per cent; passenger expense was divided upon the basis of revenue and in one case with ten per cent extra cost. The result upon the freight rate was practically equivalent to dividing upon

the revenue basis and adding 50 per cent for extra state freight cost, which was the finding below in these cases.

The revenue was the basis used by Mr. Justice Brewer in *Ames* v. *Union Pacific R. Co.*, 64 Fed. Rep., 165, 182, where he said:

> "Obviously, the cost of transportation would be the same whether the companies received the prices which they did in fact receive, or the reduced rates prescribed by house roll 33. If the cost of hauling local freight was the same as that of the other business done by the roads, in order to ascertain what amount the companies earned from local freight, it would be necessary to multiply the gross receipts by the percentage of expenses to earnings. This would show the amount that it cost to carry that freight, and the difference between that cost and the receipts would be the amount of the net earnings. From such net earnings subtract the amount of reduction caused by house roll 33, and the result will show whether, under such rates, the companies would have earned anything from local freight, and, if so, how much. * * * This is upon the assumption that the cost of carrying local freight is the same as that of carrying through freight, and hence that, applying the general per cent of expenses, enables us to determine accurately the earnings from local freight."

So in *Northern Pacific R. R. Co.* v. *Keyes*, 91 Fed. Rep., 47, 52, 53, Judge Amidon, with the concurrence of Judge Thayer, said:

> "The fundamental question in all cases like these is, will the rates prescribed by the state pay the expense of doing the local business, and leave to the carrier a reasonable compensation upon the fair value of the property which it employs in performing the service? Certain of the factors necessary to a determination of this question are capable of definite knowledge; others must forever rest largely upon opinion. The income derived from the carrier from the business which it conducts within the state can be ascertained accurately from the records of the company, but the expense of doing that business is not susceptible of mathematical ascertainment. Many of its items apply equally to local and interstate business. The different kinds of traffic are often carried in the same train,

and not infrequently in the same car. It is absolutely impossible to divide the cost of traffic thus moved, and say that this amount should be attributed to local business and that amount to interstate. It is possible, however, to ascertain the relation of the cost of doing the entire business of a railroad to its gross income. *These amounts are shown by the books of the company in dollars and cents, and furnish the basis from which all investigation as to the cost of doing local business must start.*"

In pointing out (pp. 56, 57) the difficulties with dealing with the ton mile basis, it was said:

"In justification of the rates fixed by the commission, two theories are put forth by its secretary and counsel. The first is based upon what the secretary denominates 'North Dakota's proportional' of the terminal tariffs for interstate business. The second is based upon a comparison of the rate per ton mile under the commission's schedule with the rate per ton for the entire business of the roads. * * * * * Under the other theory, the rate per ton mile of the entire business of the plaintiffs is found to be much less than the rate per ton mile on local business under the rates prescribed by the commission, and it is claimed that this fact establishes the reasonableness of the commission's rates. This, however, by no means follows. It is axiomatic that the rate per ton mile rapidly decreases as the length of haul increases. The evidence shows, as has already been pointed out, that the average haul of traffic local to North Dakota is less than one-fourth of the average haul on the entire business of the roads. This fact alone would necessitate a much lower rate per ton mile on general than on local business. But it must be further remembered that the great volume of traffic carried by the complainants consists of heavy articles, like coal, lumber, grain and live stock, which are invariably moved at the lowest of all rates; while much the larger portion of local traffic in North Dakota consists of merchandise in less than carload lots, which, under all classifications of freight, is charged a higher rate than any other kind of traffic. In ascertaining the cost per ton mile of doing the entire business of the roads, the enormous tonnage of these heavy commodities is embodied

in the calculation. No distinction is made between groceries and lumber, between dry goods and live stock. It needs no argument to show that the average cost per ton mile of a traffic composed mainly of such articles as lumber, coal, grain and live stock, hauled on an average more than 400 miles, affords no indication of what the average price per ton mile ought to be for a traffic which is made up for the most part of merchandise that is hauled on an average of less than 90 miles."

In *C. M. & St. P. R. R. Co.* v. *Tompkins*, 90 Fed. Rep., 363, Judge Carland held a law valid because of large gross returns, regardless of the cost of doing the state business. In reversing his action, his position was in *C., M. & St. P. R. Co.* v. *Tompkins*, 176 U. S., 167, 177, 44 L. Ed., 417, 422, by Mr. Justice Brewer thus stated:

"But here we are confronted by the ninth statement in the findings of fact to-wit: 'that the court is unable to find from the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896 and 1897 was.' If the court meant by that to say that there was no testimony tending to show what was the cost of doing local business, we are constrained to say that the statement is erroneous, because there was abundance of testimony bearing upon that question. If it meant simply that it could not determine that fact with mathematical accuracy, basing it upon testimony of the exact amount of money paid out for doing such work, it is undoubtedly true, but there are many things that have to be determined by the court and jury in respect to which mathematical accuracy is not possible."

That the first division of expense was to be upon a revenue basis was clearly recognized, because the learned justice said:

"The testimony discloses that the operating expenses of the entire system during each of the four years was over 60 per cent of the gross receipts. If the cost of doing local busi-

ness in South Dakota was the same as that of doing the total business of the company, then the net earnings of that local business would not exceed 40 per cent of the gross receipts."

Cedar Hill Coal & Coke Co. v. *C. & S. Ry. Co.*, 16 I. C. C. 387, 393, quoted with approval from *Gustin* v. *A. T. & S. F. R. Co.*, 8 I. C. C. 277, this language:

"The rate per ton per mile rule brings rates down to the narrowest point of scrutiny, and for that purpose is valuable; but it excludes consideration of other circumstances and conditions which enter into the making of rates, no matter how compulsory or imperious they may be, and it cannot, therefore, be accepted as controlling in determining the reasonableness of rates."

Below (Rec. 5298-5299, 168 Fed. Rep., 317, 350, 351, 355), Judge McPherson (Opinion, Rec. 5298-5299, 5303) said:

"And the courts passing upon the question have invariably recognized this as being so, and that the revenue theory is the correct one as against the ton mile. This was so recognized by the Supreme Court of Pennsylvania in case of *Railroad* v. *Pennsylvania County*, 68 Atl. Rep., 677, but not discussed. In *R. R. Co.* v. *Tompkins*, 90 Fed., 363, Judge Carland, of the South Dakota District, in passing on the statutes of that state, said: 'This court believes that it is fair and just to first ascertain what per cent of the total gross earnings in any one year the total local earnings are for that year, and having ascertained that per cent to take the same per cent of the total value of the property as a fair value upon which to fix local earnings.' The decree was reversed, and although an equity case, remanded because of a failure to make a material finding. (176 U. S. 167.) The same case under the title of *R. R. Co.* v. *Smith*, 110 Fed., 473, on final hearing resulted in a decree enjoining the rates, and the question of expenses was arrived at by the extra cost and on the revenue theory. The case of *R. R. Co.* v. *Keyes*, 91 Fed., 77, is an opinion by District Judge Amidon, concurred in by Circuit Judge Thayer,

enjoining North Dakota statutory rates. The argument of the opinion condemns the ton mile theory, and adopts the revenue theory. The criticism of the case is, that conditions in sparsely settled North Dakota are not like those in this state. But the question of which theory was the more accurate for computation, was full covered, and the ton mile was condemned. *In re Arkansas R. R. Cases,* (163 Fed., 141), decided but a few months since by Judge Van Devanter of this circuit, a temporary injunction was issued against the enforcement of the Arkansas statutory freight and two cent passenger rates. And in most respects the State of Arkansas with reference to rates is like that of Missouri, especially the south half of Missouri. Judge Van Devanter in discussing this question, said: 'Other standards are suggested, but the proofs indicate that none of them is as satisfactory or accurate as is the difference in cost in its relation to the revenue.' And the proofs, including statistics and tables and some of the same expert witnesses on each side, were the same as in the cases at bar. The great case from Nebraska of *Smyth* v. *Ames* was heard on the circuit by Justice Brewer on oral testimony, as the cases at bar have been heard. The entire discussion of the question by Justice Brewer in a lengthy opinion is on the extra cost and revenue theory, entirely ignoring the ton mile theory. That case resulted in the state statutory freights being enjoined by Justice Brewer, District Judge Dundy concurring. The case was carried to the supreme court (169 U. S., 467), resulting in an affirmance of Justice Brewer's decree. The opinion of the supreme court by Justice Harlan is exhaustive, and the tables used by him to show the facts, and the entire argument is with reference to the extra cost and revenue theory, utterly ignoring the ton mile theory. Recurring to the Tompkins case, (90 Fed., 363), above alluded to, that case was reversed by the supreme court (176 U. S., 167), and the question of fact was only discussed from the revenue theory. The reversal was only because the lower court recited that it was unable to ascertain what was the actual cost of earning the local earnings for certain years. But as the lower court on the first hearing proceeded on the extra cost and revenue theory, and as that was what was discussed by the supreme court, and under the mandate the case went to decree (110 Fed., 447), on the revenue theory, I am convinced that the supreme court for the guidance of trial courts has adopted the revenue theory as the one more just and equitable both to the patrons of the road and to the companies.

ness in South Dakota was the same as that of doing the total business of the company, then the net earnings of that local business would not exceed 40 per cent of the gross receipts."

Cedar Hill Coal & Coke Co. v. *C. & S. Ry. Co.*, 16 I. C. C. 387, 393, quoted with approval from *Gustin* v. *A. T. & S. F. R. Co.*, 8 I. C. C. 277, this language:

"The rate per ton per mile rule brings rates down to the narrowest point of scrutiny, and for that purpose is valuable; but it excludes consideration of other circumstances and conditions which enter into the making of rates, no matter how compulsory or imperious they may be, and it cannot, therefore, be accepted as controlling in determining the reasonableness of rates."

Below (Rec. 5298-5299, 168 Fed. Rep., 317, 350, 351, 355), Judge McPherson (Opinion, Rec. 5298-5299, 5303) said:

"And the courts passing upon the question have invariably recognized this as being so, and that the revenue theory is the correct one as against the ton mile. This was so recognized by the Supreme Court of Pennsylvania in case of *Railroad* v. *Pennsylvania County*, 68 Atl. Rep., 677, but not discussed. In *R. R. Co.* v. *Tompkins*, 90 Fed., 363, Judge Carland, of the South Dakota District, in passing on the statutes of that state, said: 'This court believes that it is fair and just to first ascertain what per cent of the total gross earnings in any one year the total local earnings are for that year, and having ascertained that per cent to take the same per cent of the total value of the property as a fair value upon which to fix local earnings.' The decree was reversed, and although an equity case, remanded because of a failure to make a material finding. (176 U. S. 167.) The same case under the title of *R. R. Co.* v. *Smith*, 110 Fed., 473, on final hearing resulted in a decree enjoining the rates, and the question of expenses was arrived at by the extra cost and on the revenue theory. The case of *R. R. Co.* v. *Keyes*, 91 Fed., 77, is an opinion by District Judge Amidon, concurred in by Circuit Judge Thayer,

enjoining North Dakota statutory rates. The argument of the opinion condemns the ton mile theory, and adopts the revenue theory. The criticism of the case is, that conditions in sparsely settled North Dakota are not like those in this state. But the question of which theory was the more accurate for computation, was full covered, and the ton mile was condemned. *In re Arkansas R. R. Cases,* (163 Fed., 141), decided but a few months since by Judge Van Devanter of this circuit, a temporary injunction was issued against the enforcement of the Arkansas statutory freight and two cent passenger rates. And in most respects the State of Arkansas with reference to rates is like that of Missouri, especially the south half of Missouri. Judge Van Devanter in discussing this question, said: 'Other standards are suggested, but the proofs indicate that none of them is as satisfactory or accurate as is the difference in cost in its relation to the revenue.' And the proofs, including statistics and tables and some of the same expert witnesses on each side, were the same as in the cases at bar. The great case from Nebraska of *Smyth* v. *Ames* was heard on the circuit by Justice Brewer on oral testimony, as the cases at bar have been heard. The entire discussion of the question by Justice Brewer in a lengthy opinion is on the extra cost and revenue theory, entirely ignoring the ton mile theory. That case resulted in the state statutory freights being enjoined by Justice Brewer, District Judge Dundy concurring. The case was carried to the supreme court (169 U. S., 467), resulting in an affirmance of Justice Brewer's decree. The opinion of the supreme court by Justice Harlan is exhaustive, and the tables used by him to show the facts, and the entire argument is with reference to the extra cost and revenue theory, utterly ignoring the ton mile theory. Recurring to the Tompkins case, (90 Fed., 363), above alluded to, that case was reversed by the supreme court (176 U. S., 167), and the question of fact was only discussed from the revenue theory. The reversal was only because the lower court recited that it was unable to ascertain what was the actual cost of earning the local earnings for certain years. But as the lower court on the first hearing proceeded on the extra cost and revenue theory, and as that was what was discussed by the supreme court, and under the mandate the case went to decree (110 Fed., 447), on the revenue theory, I am convinced that the supreme court for the guidance of trial courts has adopted the revenue theory as the one more just and equitable both to the patrons of the road and to the companies.

So that we have the supreme court in the two cases recognizing the revenue theory. Two circuit judges of this circuit have so held. And the same holdings have been made by at least three district judges, and the supreme court of Pennsylvania impliedly, although the argument in that opinion is not strengthened by reason of a statement as to the measure of proof, concerning which the minority opinions without doubt are correct. As an argument against the revenue theory, and for the ton mile theory, no court has spoken insofar as counsel on both sides and I are advised. In some phases this is a question of fact, or logic, or argument, or opinion, partaking of all. But so many eminent courts have thus spoken, even though not a question of law, and even though the traffic in the states differ, yet such opinions tend most strongly to create an undoubted belief that the cost for carrying both passengers and freight locally is greater proportionately than for doing a long or interstate business, and that the revenue theory is the only one to apportion the cost of each business. * * * The entire state and interstate earnings of each of the roads within the state is known and fixed to a certainty. The expenses are known and fixed. To apportion these expenses, must be done according to one of the two theories, and the correct theory is that according to revenue. One theory or other must be applied to both freight and passenger expenses, and the court should not adopt the one theory as to part, and the other theory as to another. The one theory is helpful to the one side, and the other theory helpful to the other side, the one theory to the one side in freight, and the other theory to the other side in passenger. But an arbitrary splitting of theories is illogical and unfair, and cannot be recognized. The court has adopted the revenue theory because a great number of the best railroad experts of the country, against a very limited number to the contrary have so testified. Every court that has ever had this question before it insofar as I am advised by the briefs of counsel and my own independent investigation has so held in the cases hereinbefore cited of the Supreme Court of the United States; in the two cases, by two circuit judges of this circuit; by three district judges of this circuit, and by the Supreme Court of Florida, *State* v. *Atlantic Coast Line*, (37 So. Rep., 657). And Beale & Wyman on Railroad Rate Regulation, Sec. 466, announces such as being the correct rule. The values of the property within the state have been fixed by the court. The entire earnings within the state, interstate and state, freight, passenger, and miscellaneous

of each, have been fixed. The entire expense is known, including the extra cost of each. To ascertain whether the result is a profit, and if so, what per cent, or a loss, is but a problem of primary arithmetic as is shown by Judge Van Devanter in *Arkansas Rate Cases* (163 Fed. Rep., 141). There are other methods equally simple, the resultant figures of course being the same."

In the findings and conclusions (Finding 6, Rec., 5309) below, it was recited:

"The earnings are known and fixed and in these findings stated to a certainty. But as to the expense as between state and interstate business, there has been a controversy and such is the principal controversy in the cases. There is no known fixed or certain rule for determining how this separation of expenses shall be made. The same cannot be made with mathematical certainty. Complainants claim that the division should be made upon the revenue basis; defendants claim that it should be made upon the ton mile basis for freight, and passenger mile basis for passengers, classifying the miscellaneous earnings as and with freight and passenger earnings respectively. By the revenue basis is meant to assign such proportion of the total expense in the state on that class of business as the earnings of that class of state business bears to all the earnings state and interstate from the same class, or, which is the same thing, ascertain what the percentage of all expenses is of all earnings, then multiply that by state earnings of any class, and thus obtain the sum to be assigned as state expense. The ton mile basis as to freight means the assignment as state freight expenses of any class of business such proportion of all state expenses as the number of ton miles of state freight bears to the total ton miles of all freight hauled within the state. By the passenger mile basis is meant the assignment as state passenger expenses such proportion of all passenger expenses as the number of passengers in state business carried one mile bears to the whole number of passengers, state and interstate, carried one mile. For reasons stated in an opinion herein filed, the revenue basis has been and is adopted as the only logical basis to use in arriving at a correct conclusion. The one basis or the other as a whole must be adopted. Either side can make a better showing by adopting the

one basis in part of the accounting, and the other basis for the other. Neither should be and is allowed to do this. As will presently appear, the state has attempted to do this in making its passenger earnings accountings."

(d) The finding of the court below is abundantly sustained by the evidence and is supported by reason, as a few observations will show. The facts have heretofore been considered (Statement Div. 9).

(e) That the revenue is a fair basis of first or equal division is clearly shown by Johnson's exhibit 55 in the Missouri Pacific case (Rec., 2452), giving the reasons therefor in these words:

EXHIBIT 55.

"The reasons why the proportionate part of the expenses charging to state freight should be determined upon a revenue basis and not upon a ton mile basis.

(1) Such is the way it has always been actually ascertained in previous litigation; it was used as the basis of the bills in final decrees, and actually adopted by the courts in cases where a decision upon the point was necessary. (*Smyth* v. *Ames*, 64 Fed. Rep., 165, affirmed; 169 U. S., 466, 42 L. Ed., 819; *C. M. & St. P. Ry. Co.* v. *Tompkins*, 176 U. S., 167, 44 L. Ed., 417; *C. M. & St. P. Ry. Co.* v. *Keyes*, 91 Fed. Rep., 47).

(2) It is the only certain, simple and uniform method. (a) It is the simple method because it is the easiest; given the state and interstate freight earnings, with the undivided freight expenses, and there only remains an arithmetical problem. (b) It is certain, because in this way all actual earnings are actually accounted and allowed for, whether arising from that portion of the property wholly devoted to state freight, or that devoted to interstate, or that devoted to both. (c) It is the only uniform method, because it is the only method by which a division for all purposes can be made. It is necessary to fix a valuation of that portion of the property which is used for carrying state freight. The courts (*Smyth* v. *Ames*, 64 Fed. Rep., 165, 170; *C. M. & St. P.*

Ry. Co., v. *Tompkins*, 90 Fed. Rep., 365, 370, 110 Fed. Rep., 473, 475; *C. M. & St. P. Ry. Co.* v. *Keyes*, 91 Fed. Rep., 47, 55), the state's expert (Eev. Ludlam, pp. 1153, 1154) and complainant agree that this is to be ascertained upon a revenue basis. If such valuation is to be so ascertained upon a basis of revenue, it would not be uniform to adopt a ton mile basis for dividing the expenses. That basis rests for its justification entirely upon the length of the haul, which lessens the expense. Many of the expenses, especially of the terminals, are in nowise affected by the haul. So, the state's expert (Ev. Ludlam, 1274 *et seq.*) concedes. The freight expenses of Kansas City terminals aggregate $783,647.66 per annum. The St. Louis freight terminal expenses exceed those of Kansas City. The expenses of other terminals are necessarily great. Although the state's expert (Ev. Ludlam, 1274-1275) claims that some of the terminal expense is affected by the length of the haul because trains with long hauls pass through the terminals, yet he admits (Ev. Ludlam, 1355, 1358, 1359) that the local terminal expense is three times as great as the terminal expense of the freight passing through. The result of his contention is that so much of the terminal expense as is not affected by the length of the haul should not be computed upon a ton mile basis. The state's expert says (Ev. Ludlam, 1274, 1276, 1280) that it should be upon a ton, as distinguished from a ton mile basis, that the valuation upon which a return is to be had should be upon a gross revenue basis (*id.*, 1153, 1154), that rentals should be divided (*id.*, 1322, 1428) upon the basis of the ton miles moving over the rented track, as distinguished from the ton mile basis applicable to the entire state, and that as between passenger and freight business interest should be divided according to net revenue (*id.*, 1429) and not, as decided by the courts (*C. M. & St. P. Ry. Co.* v. *Smith*, 110 Fed. Rep., 473, 475) upon gross revenue, but as between state and interstate freight (*id.*, 1281, 1282) a ton basis. Lack of uniformity is necessarily the result of the state's contention, for the *gross* revenue basis would have to be applied to valuation, *net* revenue to interest as between passenger and freight business, the ton basis to such portion of the terminal expenses as was not affected by the length of haul, and as to interest so far as it concerns state and interstate freight, the ton mile basis for the entire state to all other expenses, excepting rentals, to which should be applied the basis of ton miles only which moved over the rented track. The contention of complainant is that the

simple, certain, uniform method is the revenue basis, and such is the method in general use.

(3) The many reasons given by the expert witnesses as to why expenses should be divided according to revenue are not attempted to be here repeated.

(4) It is absolutely impossible to reliably compare state and interstate freight expenses upon a ton mile basis unless the character and amount of tonnage in each shipment and the cars in each train be taken into consideration. The waste space and loss of tonnage, and the loss of cars in a train make necessary elements to be considered in the comparison. Especially is this true upon the Missouri Pacific Railway, where the Missouri retail dealers have the most of their shipments to and from Kansas City and St. Louis, all of which is state business. Whenever at one local point a shipment is unloaded, there is waste space left, though the train may move on in distributing its loads. The same thing is true in bringing loads from the country into those cities. This is not limited to freight in less than carload lots, because in carload lots the cars are distributed and taken into the train at different points, so that between those different points the number of cars in a train may differ, and necessarily the amount of tonnage carried. So in state business the waste tonnage in the cars carried is very much greater than in the interstate business. The amount of interstate traffic in parcels is trifling compared to the volume of interstate business, whereas a very large portion of the state business is of that character.

(5) In handling state and interstate business, and local and through trains, of the elements of expense to be considered, the following are some where no aid can be derived from the comparison made upon a ton mile basis: The time consumed between stations; additional fuel consumed at each station, where there is a stop; wear and tear of the locomotive and cars from increased stops and from shifting cars from main to side tracks; wages of employes at intermediate stations; cost of insurance; cost of billing and handling freight at terminals.

(6) So, while the waste space, loss of tonnage, loss in cars carried, terminal expense and other matters mentioned have an important bearing upon the question of the expense as between state and interstate business, not one of such items is affected by the length of haul. Upon the other hand, the shortness of the haul is one of the elements which makes it

cost more to do state than interstate business. Therefore, a comparison upon a ton mile basis, the foundation of which is *length* of haul would be improper."

This document was adopted and approved in exhibit 41 in the Burlington case. Many additional reasons were therein given by Mr. Sturgis, an eminent expert (Exhibit 41, Rec., 1441-1445).

(f) The auditors of the eighteen railroads adopted the revenue basis, it being the method used by all railroads where it has been necessary to divide expenses as between state and interstate.

(g) The best railway experts in the world favored it, giving many reasons for their views in addition to those set forth in the Missouri Pacific exhibit 55 and C. B. & Q. exhibit 41. Among these experts so testifying were Carl Gray, vice president and general manager of the Frisco (Rec., 3929-3939, Cross Ex. Rec., 3940-4034); C. J. McPherson, manager of the Missouri Pacific (Rec., 4288-4307); W. T. Tyler, general superintendent Frisco (Rec., 4099-4112); W. H. Whittenton, superintendent Chicago, Rock Island & Pacific (Rec., 4140-4142); J. W. Kendrick, vice-president of the Santa Fe (Rec., 4390-4399); William Ellis, commerce counsel of C. M. & St. P. (Rec., 4194-4220); B. H. Bethard, general manager Missouri Pacific (Rec., 1821-1834; Rec., 4077-4098); W. B. Doddridge, former general manager Missouri Pacific (Rec., 1568-1629, 1647-1654, 1769, 2273, 3814-3823); D. C. Buell, assistant to president of Frisco, Missouri Pacific case (Rec., 1794-1799); W. C. Stith, general traffic manager of Missouri Pacific (Rec., 1465-1542, 1770-1773); C. I. Sturgis, general auditor of the C. B. & Q. (Rec., 229-425, 707-709, 1078-1133); Howard Elliott, president Northern Pacific (Rec., 426-492); George B. Harris, president C., B. & Q. (Rec., 536-554); Darius Miller, general traffic manager of C. B. & Q. (Rec., 605-618);

George H. Crosby, assistant general manager of C. B. & Q. (Rec., 555-558, 846-847).

No justice can be done the finding of the court below without reading all that these experts say upon the subject, and the many reasons given for their opinions.

(h) The division upon the revenue basis (Finding 19, Rec., 5317-5326), as the first or equal cost of doing the state carriage business, assigns as such expenses, including taxes and rentals, in each of the cases tried, these sums:

Case No.	Road.	Test Period	State Freight Exp.	Passenger.
672-3	St. L. & S. F.....	3 mos.	$ 384,404.62	$ 518,814.10
674-5	A. T. & S. F.....	6 "	96,085.30	88,735.83
678-81	C. R. I. & P.....	3 "	124,955.58	142,300.33
682-3	K. C. S.	6 "	26,000.96	28,671.06
684-5	St. L. & H.	12 "	76,348.95	55,109.23
690-1	M. K. & T.	6 "	192,155.42	210,815.34
130-134	C. B. & Q.	12 "	1,326,941.82	1,492,545.21
698-9	K. C. C. & S.....	12 "	28,438.06	60,464.27
700-1	C. G. W.	6 "	23,610.13	40,309.23

The miscellaneous revenue and expenses would have made no difference, because had the revenue been divided as claimed it should be done, there would have been no difference in the result. Of this something will be hereinafter said. This will be readily observable if there be added to the expense the small percentages shown in request 22 (Rec., 157-162). Besides that, in such case the revenue and assignable value must necessarily be increased as shown by the request.

6. Diminution in Freight Earnings.

(a) The state freight rates were enjoined and the old rates kept in force. To ascertain the loss under the new laws, it was,

of course, necessary to ascertain how much the earnings would have been diminished if the new rates had been charged. This diminution (Finding 19, Rec. 5324) was specially found (Rec., 5100). It is proper to deduct the amount thereof from the earnings (*Smyth* v. *Ames*, 169 U. S., 466, 565, 42 L. Ed. 819, 845; *Ames* v. *Union Pac. R. Co.*, 64 Fed. Rep. 165). It is assumed that this is a matter which will be undisputed, because no question has ever been raised in reference hereto.

(b) The amounts of diminution were quite large. That of the C. B. & Q. under the act of 1905, exclusive of that on stone and fruit, was (Rec., 238) $171,122.07, as against (Finding 19, Rec., 5324) $112,533.71 under the act of 1907. The state rate (Finding 3, Rec., 5306, 5307) necessarily fixed the interstate, the annual reduction in the earnings from interstate upon the C. B. & Q. (Ev. Sturgis, Rec., 4746, 5098, Exhibit 101) it aggregated $477,-647.79 under the act of 1907, and under the act of 1905, $700,-487.29. The reduction of the state freight earnings by the act of 1905 appears as to the only two other roads as to which evidence was taken at the time when there was a controversy over that law. Upon the Missouri Pacific it was (Rec. Vol. III, pp. 2459, 2460, exhibit 56) $74,800.09; upon the Wabash (Rec. Vol. III, p. 3325, exhibit 2) $36,574.10. It does not appear in detail as to other than these three roads because it was conceded (Ev. Taliaferro, Rec., 4409, 4566) by the state that it was more under the act of 1905 than under that of 1907, the amount as to which was in the case of each road shown, and because at the final trial agreed test periods were taken by both sides to test the laws of 1907. The actual diminution of state freight earnings under the act of 1907 as to the roads whose cases were tried was stated by the railroad auditors, conceded by the state experts and specially found (Finding 19, Rec., 5318-5326) by court for agreed test periods, so that the loss per year, as against the then existing low

state freight rates, became a mathematical calculation, and may be thus tabulated:

Case No.	Road	Test Period	Amount	For one year
672-3	St. L. & S. F.	3 months	$ 11,389.27	$ 45,557.08
674-5	A. T. & S. F.	6 months	13,885.87	27,771.74
678-81	C. R. I. & P.....	3 months	9,989.43	39,957.72
682-3	K. C. S.	6 months	2,957.58	5,915.16
684-5	St. L. & H.....	12 months	15,126.02	15,126.02
690-1	M. K. & T.....	6 months	20,222.85	40,445.70
130-4	C. B. & Q.....	12 months	112,533.71	112,533.71
698-9	K. C. C. & S.....	12 months	2,970.21	2,970.21
700-1	C. Gt. W.	6 months	1,893.41	3,786.82
Total				$294,044.16

The proofs of these figures clearly appeared from the evidence of the auditors and were by the state's experts in each instance admitted in their statements. The joint statements (Rec. 175-212) of the experts so admitted. At the close of the trial the court by consent of all parties ordered (Finding 14, Rec. 5312; Order, Rec. 174) that two experts from each side compile the figures upon each of the theories presented. As to this diminution, the experts in their report (Rec., 175-212) absolutely agreed to the figures thus set forth. This diminution becomes quite significant when it is borne in mind that the short distance between the rivers made the east and west rates in Missouri unreasonably low. In other words: the statutory state freight rates were upon a mileage basis. The great volume of state traffic was to and from, and between St. Louis and Mississippi river points upon the east side of the state and Kansas City and Missouri river points upon the west. The short distance between the rivers was 198 miles. The distance from St. Louis to Missouri river points was nearly 300 miles. So that upon the state mileage rates, the companies could only earn the rate for 198 miles but were put to the expense of operating 278

to 300 miles (Finding 3, Rec., 5306-7). So that if a road operated upon the basis of 70% of its gross earnings, it would actually lose money in carrying 300 miles when it was only paid therefor on the basis of 198.

These figures as to diminution appear in each statement by the railroad auditors and by them, and the state's expert were specifically proven to be correct (Ev. Douglass, Rec., 3776; Exhibit 2, Rec., 4791; Peabody, 4409; Exhibit 45, Rec., 4941; Taliaferro, 4409, 4565-4566, 4772; Nay 4687; Exhibit 78, Rec., 5028; R. J. McIarty, 4700; Exhibit 81, Rec., 5045; Worland 4707; Exhibit 87, Rec., 5062; Seelig, 4714; Exhibit 89, Rec., 5066; Smith, 4726; Exhibit 93, Rec., 5087; Sturgis, 4745; Exhibit 100, Rec., 5097; Ernst 4776; Exhibit 106, Rec., 5108). They also appear in and are allowed for in the joint statements (Rec., 175-212) of the experts appointed by the court (Rec., 174) by consent. They are allowed in each statement made by the state's expert (Exhibits 64, 77, 81, 86, 92, 103, 109, Rec., 4986, 5023, 5040, 5058, 5080, 5101, 5118).

(c) It is then only necessary now to say, when from the earnings there are taken the expenses upon the basis of equal cost, (*supra* Div. III subd. 6 par. h) and diminution of new freight rates, (*supra* b) the net results and percentages of return (Finding 19, Rec., 3318-5327; Report of joint experts Rec., 175-212), i. e., without any allowance for extra cost, are:

Case No.	Road.	Period.	%	Freight.	%	Passenger.	Combined.
672-3	St. L. & S. F.	3 mos.	8.3	$181,398.95	3.54	$ 80,237.49	$261,636.44
674-5	A. T. & S. F.	6 "	8.09	31,161.83	5.49	15,634.36	46,796.19
678-81	C. R. I. & P..	3 "	2.04	16,008.67	0.00	27,447.29 (Def.)	11,438.62 (Def
682-3	K. C. S.	6 "	6.58	9,790.22	2.6	3,194.22 (Def.)	6,596.00
684-5	St. L. & H. .	12 "	0.00	3,532.98 (Def.)	0.00	2,441.85 (Def.)	5,974.83 (Def
690-1	M. K. & T...	6 "	5.18	65,038.25	3.18	35,553.19	100,591.44
130-34	C. B. & Q...	12 "	2.11	146,030.09	1.79	124,754.71	270,784.80
698-9	K. C. C. & S.	12 "	3.61	13,594.88	0.00	12,817.47 (Def.)	777.41
700-1	C. G. W. . . .	6 "	2.69	3,625.82	0.00	2,204.20 (Def.)	1,421.62

This should then be compared with the returns (*supra* Div. III., subd. 4, par. c), to which the companies are entitled. From this it will be observed upon the combination of freight and passenger business, without extra cost, the A. T. & S. F. (Cases No. 674-5) is the only company which receives a return in excess of six per cent. It was entitled to receive $40,157.51 and actually received $46,795.99. Upon passenger business alone no company received a six per cent return. Upon freight the St. L. & S. F. (Cases No. 672-3) received $181,398.55, 8.3%, as against the 6% return to which it was entitled, or $130,857.42; the A. T. & S. F. (Cases Nos. 674-5) 8%, or $31,161.63 as against the 6% or $23,089.35 to which it was entitled; the K. C. S. (Cases Nos. 682-3) 6.58%, or $9,790.22 as against 6% $8,923.38. No other company received as much as six per cent. This is all wholly irrespective of any allowance for extra cost, but solely and alone upon the basis of what was in the Nebraska and North Dakota cases (*Ames* v. *U. P. R. Co.*, 64 Fed. Rep. 165; *Smyth* v. *Ames*, 169 U. S. 466, 44 L. Ed. 417; *C. M. & St. P.* v. *Keyes*, 91 Fed. Rep., 47), said to be the equal cost of doing state and interstate business.

7. THERE IS A SUBSTANTIAL EXTRA COST OF DOING STATE BUSINESS OVER INTERSTATE, WHICH SHOULD BE DEDUCTED FROM THE EARNINGS.

(a) That there is a substantial extra cost in doing state business over the interstate was decided below (Finding 15, Rec., 5296-5297; Opinion, Rec., 5296, 5297; 168 Fed. Rep., 317) Judge McPherson holding that the state freight expense was in excess of fifty per cent more than the interstate, and that the state passenger was in excess of twenty-five per cent more than interstate. The facts in reference hereto have already been outlined (Statement Div. 24 par. 10).

The joint experts (Rec., 175-212) appointed (Rec., 174) by consent concede that there was with state freight an extra cost of 30% to 50% upon the ton mile basis. The state experts so testified (Ev. Ludlam, Rec., 2005-6; Ev. Taliaferro, Rec., 3260, 4590). The amounts thus fixed by the state experts, added to the equal cost upon the basis of revenue, would render confiscatory all state freight rates, as well as all state freight and passenger rates combined.

(b) Mr. Justice Brewer (*Ames* v. *Union Pacific*, 64 Fed. Rep., 165, 184), and Mr. Justice Harlan (*Smyth* v. *Ames*, 169 U. S., 466, 469, 42 L. Ed., 819, 843) said this extra cost should be allowed and took as sufficient for the purposes of that case, the estimate of the state's expert, of ten to twenty per cent more than the average cost of all business, which figures out the state about twenty-five to fifty per cent more than interstate expense.

Mr. Justice Brewer, in the South Dakota case (*C., M. & St. P.* v. *Tompkins*, 176 U. S., 167, 178, 179, 44 L. Ed., 417, 422), enlarged upon the idea and said that the amounts were dependent upon "the opinion of experts familiar with railroad business" which "cannot be disregarded."

In *C., M. & St. P.* v. *Keyes*, 91 Fed. Rep., 47, 53, 55, Judge Amidon, with the concurrence of Judge Thayer, allowed a sum equaling twice the amount of transportation expenses.

Mr. Justice, then Circuit Judge, Van Devanter (*In re Arkansas Rates*, 163 Fed. Rep., 141, 142), said that the extra cost of freight was at least 100 per cent more and that of passenger at least 15 per cent more than interstate. Upon final hearing (187 Fed. Rep., 290, 344), of the Arkansas case, Judge Trieber allowed 210 and 250 per cent for state freight extra cost, on a ton mile basis for operating expenses, and a revenue basis for maintenance, taxes, rental and hire of equipment. He also allowed in one case ten per cent upon the revenue basis for passenger extra expense.

The sum total of his finding as to freight was about 50% extra cost upon the revenue basis.

In *Buell* v. *C., M. & St. P.* (R. R. Commission of Wisconsin, p. 182), it was said:

> "It is fair to assume that the local passenger traffic as here understood is about ten per cent more costly than the through traffic."

Upon this subject, Judge Hook, in the Oklahoma case (*M., K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493, 499, 500), said:

> "Bearing on the division of expense is the much controverted question of extra cost of the local business as compared with the interstate. That the former costs much more than the latter is beyond doubt, but the difficulty is in applying the measure of difference. There is a general accord among practical railroad men of high standing and long experience that the cost of local freight traffic is from two to eight times as much as that of interstate traffic, and of local passenger traffic from twenty-five to fifty per cent more than the other. Though not altogether clear from the proofs here it is probable the difference mentioned in the freight traffic should not be fully applied in addition to a division on the revenue basis, for, as already seen, the difference finds expression in a measure in the relative revenue proportions themselves. A cogent reason for selecting the revenue basis in preference to the ton mile is that the former gives some effect to the known differences in cost. Nor is it altogether clear that the above ratio of extra cost of local freight traffic was intended by the witnesses to apply to all operating expenses as classified by the Interstate Commerce Commission and the Corporation Commission of Oklahoma. In *Southern Pacific* v. *Bartine*, (170 Fed., 725), the ratio of extra cost was confined to transportation expenses as distinguished from maintenance of way and structures, maintenance of equipment, and traffic and general expenses. But substantial factors of extra cost of local traffic may be found in other general accounts; for example, in the large cost of maintenance of yard tracks and sidings at terminals which is charged not as a transporation expense but to maintenance of way and

structures. Those tracks sometimes constitute a fifth of the total mileage of a railroad. The criticism of the formula for apportioning extra cost mentioned in the Arkansas case (161 Fed., 141), is due to a misconception. It appears the evidence in that case showed that on a revenue basis the cost of local freight traffic was double that of the interstate. The court gave a quick abstract rule for ascertaining the local cost, which, if applied to the facts there, would have been to double the local revenue, add it to the interstate revenue, ascertain what proportion the doubled amount bore to the total sum and then take that proportion of the total cost of both. Although every algebraic or mathematical formula applied to the particular facts before that court would have brought the same result, it is earnestly argued here that if a given body of rates are confiscatory they must, under the rule of the Arkansas case, still be confiscatory though the revenue were doubled by doubling the rates—that confiscation would follow, however high the rates and great the revenue. Obviously, if revenue is doubled solely by increasing local rates there would be little, if any, increase in gross cost; if revenue is doubled by increase in volume of local traffic without changing rates the gross cost would probably increase, but not proportionately. But no such construction as contended for can be put upon the language of the court. If the formula given is to be applied to shifting conditions there should be a corresponding change in the numerical factors. This is obvious from a cursory reading of the opinion. A change in the amount of local revenue from whatever cause, rates or volume of traffic, would affect the relative cost predicated on the revenue basis, but whenever the ratio is found the apportionment can readily be made by employing it in the way indicated in the Arkansas case. The evidence here shows that, regarding average conditions and not exceptional instances, there is a substantial difference between interstate and local traffic in the ratio of cost to revenue. Particularly is this so as to freight. In other words, the apportionment of expense on a revenue basis does not adequately express the difference between them. It is not necessary to determine it definitely in view of the property of the companies and the statement that because of exceptional circumstances the Atchison, Topeka & Santa Fe and the Gulf, Colorado & Santa Fe roads should be considered together."

Upon appeal this rule was sustained (*Love* v. *A. T. & S. F. R. Co.*, 185 Fed., 321, 107 C. C. A. 403; certiorari being here twice denied, 218 U. S., 675; 220 U. S. 618).

In *Shepard* v. *Northern Pac. Ry. Co.*, 184 Fed. Rep., 765, 813-815, Judge Sanborn said:

"All admit that the cost of doing intra-state business exceeds the cost of doing interstate business, and the issue is, how much does the cost of doing the former exceed the cost of doing the latter? Upon that issue many hundreds of printed pages, a mass of evidence too vast for recital or review, have been examined and considered by the master and the court. The evidence for the state consists of the testimony of Mr. Hillman, and the evidence for the complainants is the testimony of six men who have long been engaged in and are familiar with the actual operation of railroads and the expenses thereof. Many criticisms of the testimony of each of these witnesses, of their opinions, and of the reasons they give for them, have been made by counsel for the respective parties, and have been the subjects of study and reflection in the light of the evidence and the arguments. Mr. Hillman's conclusion in the Northern Pacific case, and it was similar in the other cases, was that the cost per ton mile of doing intrastate business was about 44 per cent more than the cost of doing interstate business. Starting with the cost of doing business which was entirely local upon certain branch lines of the company, a cost which he extracted from its records, and with the assumption that the cost per ton per mile of doing the local business on the main lines of the company was the same as it was on the branch lines, he derived this result from these premises, from other records and reports of the company, and from a long and intricate series of computations, assumptions, and deductions. No chain, however, is stronger than its weakest link, and an examination of the method he pursued and the bases upon which he founded his conclusion has convinced that the result he deduced is conditioned by so many of his own opinions and assumptions, unsupported by other persuasive proof, that his conclusion is entitled to no more weight than his opinion that it and the means by which he reached it are correct.

Many witnesses, however, whose evidence disclosed the facts that they had long been engaged in the actual operation of railroads, that they had learned and knew from actual observation and experience the conditions which increased and diminished the cost of the transportation of freight, and the relative effect of these conditions upon the cost of interstate and intrastate transportation, that they were familiar with the details of the relative expenses of doing intrastate and interstate

freight business, witnesses whose opinions are certainly as likely to be sound as that of Mr. Hillman, came and testified that, while they had no means of accurately and mathematically determining the fact, they were confident in the opinion that the cost per ton per mile of doing intrastate freight business was from three to six times the cost per ton per mile of doing interstate business. Counsel for the defendants say that a portion of local business is interstate business and takes a short haul, and a portion of through business is intrastate business and takes a long haul, and that the effect of the testimony of these witnesses is not that the cost per ton per mile of intrastate freight business is from three to six times the cost of interstate freight business, but merely that the cost of local and short-haul business bears that relation to the cost of through and long-haul business. The testimony of these witnesses has been considered in view of this criticism, but the record does not seem to sustain the contention of counsel. For example, Mr. Elliott says that the average haul of intrastate freight in Minnesota on the Northern Pacific Railroad was about 104 miles, that the average haul of interstate freight touching Minnesota on that railroad was about 485 miles, that the expense of short haul is much greater than that of long hauls, and after enumerating various other reasons he testified that these reasons 'all lead me to the conclusion that the so-called short haul intrastate business costs anywhere from three to six or seven times as much as the so-called long haul, through interstate business.' On his redirect examination he was asked if by the statement which has just been quoted he meant 'to compare the average cost of the state business with the average cost of the interstate business,' and his answer was, 'That was my intention in making that statement in my direct examination last week.' Mr. Doddridge testified in the Great Northern case that his judgment was that upon the basis of ten miles, excluding the Missabe ore traffic, the ratio of extra cost per ton per mile of intrastate Minnesota freight was at least three times, and maybe four times, as great as that of interstate freight. True, much was said in the testimony of these and other witnesses of the extra cost of short hauls over long hauls, and of local business over through business, for the witnesses had in mind that a larger proportion of the interstate freight than of the intrastate freight was through business and took the long hauls; hence the terms 'local freight' and 'local business' appear to have been frequently used in this case and in other cases of this character to mean intrastate freight and intrastate business. But, when

all the testimony of each of the six witnesses for the complainants upon this issue is considered together, it is persuasive that their testimony clearly discloses their opinions that the cost per ton per mile of the intrastate freight business of the two companies in Minnesota was from three to six times the cost of their interstate freight business in that state. The testimony of Mr. Hillman on behalf of the defendants falls far short of prevailing over this evidence, and the exceptions to the finding of the master that the cost of the Minnesota intrastate freight business of the companies per ton per mile was at least 2½ times that of the interstate freight business must be overruled. For similar reasons the master's finding that the cost of intrastate passenger business per passenger mile was 15 per cent more than that of interstate passenger business is confirmed. *Missouri, Kansas & Texas Ry. Co.*, v. *Love* (C. C.) 177 Fed., 493, 499; *In re Arkansas R. R. Rates* (C. C.) 163 Fed., 141, 142; *Chicago, Mil. & St. P. Ry. Co.* v. *Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; *Minneapolis & St. L. R. R. Co.* v. *Minnesota*, 186 U. S., 257, 262, 22 Sup. Ct. 900, 46, L. Ed. 1151; *Ames* v. *Union Pacific R. R. Co.*, (C. C.) 64 Fed., 165, 184; *Northern Pac. R. R. Co.* v. *Keyes*, (C. C.) 91 Fed., 47, 54; *St. Louis & S. F. R. R. Co.* v. *Hadley*, (C. C.) 168 Fed., 317, 348. The master did not rest his final conclusions on this relatively greater cost of intrastate business per ton per mile without a careful consideration and credit to the intrastate business of the relatively greater revenue per ton per mile derived from that business, thus reducing the percentage for the freight business in the Northern Pacific case, for instance from 250 per cent to 173+ per cent and for passenger business from 115 per cent to 113+ per cent."

Below (Opinion, Rec., 5296; 168 Fed. Rep., 217, 348, 349) **Judge McPherson said:**

"That it costs more to carry either freight or passengers proportionately for a short than a long haul, is undoubtedly true, although all the elements are not more expensive. Local trains generally have poorer and older and cheaper cars and locomotives. But their speed is greater between stations. There are many stops. They carry proportionately much greater dead weight. They do much switching, and there are many delays. Their crews are paid more proportionately to

distance and what is carried. The trains are daylight trains only. With freight the carload and number of cars are much the less, and from station to station grows less, and is largely made up of single parcels, boxes, and individual shipments from as many consignors to as many consignees, first put in station, and at the end of the trip into another station by the company. Usually there are two terminals, comprising an enormous amount of investments and expenses of the company. The local train is seldom loaded to the capacity of the engine, to the loss of much of the investment and expense. The clerk hire, selling tickets, issuing bills of lading, making expense accounts, and auditing and making records, are attended with like expense for the small and the large items. Many stations would be done away with but for local business. But from the great weight of the testimony, it can well be said that the ton mile is not reliable, and the revenue is more nearly correct, as showing that it costs more by twenty-five per cent to carry passengers, and fifty per cent to carry freight locally than it does when interstate. Generally speaking this is undoubtedly true. There are exceptions, one of which is shown by the Burlington with its three roads from St. Joseph, the one to Villisca, Iowa, another to Creston, Iowa, and a third to Chariton, Iowa. They are all interstate roads, each with two terminals, but each operating only local and daylight trains. The Wabash illustrates this with roads across the arbitrary state line between Missouri and Iowa. And there are other illustrations, but less noticeable, in the testimony."

In finding 7 (Rec., 5310), it was said:

"The expense of doing the state business over interstate is greater for carrying freight by at least fifty per cent, and at least twenty-five per cent, for carrying passengers. Therefore this extra cost must be added to the expenses after they have been ascertained so as to obtain the total expenses. If the ton mile basis of division were adopted, the extra cost should also be added. This would require the use of another multiplier sufficient to bring the sum total of the state freight expense equal to that found herein, to actually represent the cost as shown by the evidence. Any apportionment of passenger expense upon the passenger mile basis would be unfair and unjust, although much more favorable to the companies than if made upon the revenue basis."

In finding 8 (Rec., 5311) it is stated:

> *"All things considered, the evidence shows the cost of doing the different classes of state business as between state and interstate apportioned upon the revenue basis with added extra cost brings a result in these findings stated, which is fair and representative and just. The court finds, aside from the revenue basis, that the evidence shows the amount ascertained in each case as the expense and extra cost, is fair and justly represents the expense of doing each class of state business.* The extra cost as to each complainant for doing the state business over interstate is more than fifty per cent. in case of freight, and more than twenty-five per cent. in case of passenger. This extra expense as thus found is considerably in excess of these figures and the figures used are adopted as the minimum. The sum total of this extra cost if ascertained according to the ton mile theory, would not be changed because it is a question of multiplication, and one multiplier or another must be used accordingly as the theory is adopted. The findings herein made on all the evidence represent in dollars the fair cost and expense fixed at a minimum."

(c) Here experts clearly show that the extra cost of the state freight is three to five times as much as the interstate, and the passenger from twenty-five to one hundred per cent.

(d) The following were the estimates of the railroad on extra cost of state business over interstate business, upon a revenue basis where not otherwise indicated (the references to "Rec." only being to the final trial):

Bethard, B. H., General Manager of the M. K. & T.: Passenger, 40 to 65 per cent (Rec., 4078); freight, 4 or 5 times (Mo. Pac. case, Rec., 1824).

Buell, D. C., Assistant to President, St. L. & S. F.: Freight, 3 times (Mo. Pac. case, Rec., 1794-1799).

Clark, H. G., General Superintendent of Mo. Pac.: Freight, 4 or 5 times on ton mile basis (Mo. Pac. case, Rec., 1630-1631).

Crosby, Geo. H., Assistant General Traffic Manager, C., B. & Q.: Freight, 3 to 5 times (C. B. & Q. case, Rec., 583).

Doddridge, W. B., former General Manager of Mo. Pac.: freight, ton mile theory, 4 times (Rec., 3822); freight, revenue theory, 2 times (Rec., 3822); freight 3 to 6 times, 3 being minimum (Mo. Pac. case, Rec., 1584-1595, 1596); passenger, 25 per cent (Rec., 3827).

Elliott, Howard, President Nor. Pac.: Freight, 3 times (C. B. & Q. case, Rec., 427, 484); 6 times on ton mile basis (*id.*).

Ellis, Wm., Commerce Counsel, C., M. & S. P.: Passenger, 50 per cent very low (Rec., 4196); freight, a great deal more than 300 per cent (Rec., 4197).

Eustis, P. S., General Passenger Agent, C., B. & Q.: Passenger, 50 per cent (Rec., 4368).

Fisher, W. T., Head of Weighing and Inspection Dept., Mo. Pac.: Freight, 2 to 6 times (Mo. Pac. case, Rec., 1753).

Gray, Carl, Vice-President and General Manager, St. L. & S. F.: Passenger, 20 to 30 per cent (Rec., 3939); freight, 3 to 5 times (Rec., 3931).

Gray, Henry, Comptroller of the Northern Pacific: Freight, 7 to 11½ times on ton mile basis (C. B. & Q. case, Rec., 620).

Harris, Geo. B., President, C., B. & Q.: Freight, 3 to 5 times as much (C. B. & Q. case, Rec., 540).

Kendrick, J. W., Vice-President A., T. & S. F.: Passenger, 50 to 100 per cent (Rec., 4399).

Kimbell, R. E., Assistant General Auditor, St. L. S. W. Ry. Co. (Rec., 4177); freight by actual test, from three to four times (Exhibit 6482).

Miller, Darius, Traffic Manager, C., B. & Q.: Freight, 3 times, conservatively (C. B. & Q. case, Rec., 607).

Miller, Henry, General Manager, Wabash: Freight, 2 or 3 times, ton mile basis (Wabash case, Rec., 2829).

McPherson, C. J., Assistant General Manager, Missouri Pacific: Freight, several times (Rec., 4300); passenger more than 25 per cent (Rec., 4307).

Peabody, James, Accountant, A., T. & S. F.: By actual test, freight over three times; passenger 47.2 per cent (Rec., 4408).

Rainey, S. L., Assistant to General Manager, St., L. & S. F.: Freight 3 or 4 times (Mo. Pac. case, Rec., 1837).

Rawn, I. G., General Manager, Ill. Cent.: Freight 3½ times on ton mile basis (C. B. & Q. case, Rec., 572).

Stith, W. C., Traffic Manager, Mo. Pac.: 2½ times for freight (Mo. Pac., case, Rec., 1496).

Stuart, J. S., General Manager, Erie R. R.: Freight, 5 to 8 times, ton mile basis (C. B. & Q. case, Rec., 691).

Sturgis, C. I., General Auditor, C., B. & Q.: Freight 3 to 7 times (C. B. & Q. case, Rec., 245-246, 397).

Tyler, W. T., General Superintendent, St., L. & S. F.: Freight 3 to 5 times (Rec., 4101); passenger, 35 to 40 per cent (Rec., *id*).

Whittenton, W. M., General Superintendent, C., R. I. & P.: Freight 3 to 6 times (Rec., 4142); passenger, 25 to 50 per cent (St. L. & S. F. case, Rec., 4140).

Willard, Daniel, General Manager, C., B. & Q.: Freight 3 times, ton mile basis (C. B. & Q. case, Rec., 494, 535).

The fact that some of the estimates of extra cost are upon the ton mile basis is no indication that the witness thought the equal division should be upon that basis. Howard Elliott (C. B. & Q. case, Nos. 130, 134, Rec., 484) and W. B. Doddridge (Rec., 3822) pointed out that it came to the same end, the total expense being that ascertained upon an equal basis plus the extra cost. If there be adopted the ton mile theory to ascertain the extra cost, it should be ascertained by using a higher multiple than would be used upon a revenue basis. The total expense will be the sum total of the two. The real question is, does the extra cost, however ascertained, bring a result which is just?

(e) That there was an extra cost was conceded by the state's experts. The chief expert at the trial (Ev. Taliaferro, Rec., 4593) thus testified:

"Q. The first statement is gotten up on the theory that the state business does not cost any more than the interstate? A. Yes, sir.

Q. According to your own statement, that is not a true theory, because you testified that the extra cost was at least 30 per cent, to 50 per cent.

Mr. Ladd: 20 per cent to 50 per cent.

Mr. Hagerman:

Q. 20 per cent to 50 per cent? A. Exhibit 2 contains calculations of that kind on the freight earnings basis. I do not mean for a minute that I do not think it costs more per ton mile to do the state than the interstate business.

Q. So the first column must not be taken to indicate, in your judgment, anything in the expense, as allowing for extra cost? A. That is right.

Q. And you have figured it at 30 per cent and at 50 per cent, is that right? A. Yes, sir. 30 per cent I believe is nearer right than any other figure I could name.

Q. In the previous hearings before the Master, Mr. Schofield, you said 50 per cent? A. I said 50 per cent as a maximum.

Q. But you never gave it as forcibly in that examination? A. I am sure you are mistaken about that, Mr. Hagerman.

Q. I will take it back then. A. You asked me here in Kansas City at one of the hearings, if we had ever worked out any figures that would enable me to come nearer than 50 per cent, and I said yes, that in certain figures in the Burlington case, I think it was in the Burlington case, it worked out 35 and a fraction.

Q. That testimony is in the record, and we will see what it is. Your remembrance is that it was 50 per cent? A. No, sir.

Q. You did not say 30 per cent before, did you? A. No, sir.

Q. Or 20 per cent? A. No, sir, that is right.

Q. After working since 1906 on these cases, you have come to the conclusion that it ought to be from 20 per cent to 50 per cent? A. Yes, sir.

Q. Now that is upon the ton mile or revenue basis? A. That is upon the ton mile basis."

C. S. Ludlam, leading state expert before the master (Rec., 2005-6) said:

"Q. Mr. Ludlam, in your opinion, is it possible or practicable to ascertain accurately or exactly the increased cost of doing state business over interstate business? A. No, sir.

Q. What approach to accuracy do you think can be made? A. I think there are certain elements that enter into the question that are more or less a matter of opinion. Such, for instance, as the increased cost of doing business on local or way trains, over the cost of doing business on through trains. But I think if you make allowance for all those questions, all of those elements, you can still demonstrate even after making the most liberal allowance for those items that are matters of opinion, and still demonstrate that mathematically the cost of doing the state business could not exceed the cost of doing the interstate business by as much as 50 per cent.

Q. Per ton mile, do you mean? A. Yes sir.

Q. And you think that within the 50 per cent limit it might be a matter, and is to some extent at least a matter of opinion? A. Yes, sir. I think I said that as to certain items it is a matter of opinion. But if you allow the most exaggerated estimate of those particular elements that are matters of opinion, you still cannot exceed a total maximum cost in excess of 50 per cent on the state business over what it is on the interstate business per ton per mile."

Mr. Taliaferro (Rec. 3260) before the master, said:

"My idea is that the additional expense cannot possibly exceed fifty per cent of the cost per ton per mile of interstate business. That is the limit. I think it is less.

The Master:

Q. That is to say, it would not be more than one and one-half times as much per ton mile? A. Yes, sir.

Mr. Ladd:

Q. That is to say, if one dollar was the unit of cost of interstate business per ton mile, it would not be over one dollar and a half for state business for the same thing? A. That is it."

All the tables prepared by Mr. Taliaferro (Exhibits 103-104-

105, Rec., 5101, 5105) concede the extra cost on freight to be 30 per cent and 50 per cent. The tables prepared by the four experts (Rec., 175-212) of the state's figures on freight, so concede.

(f) The extra cost, whether the percentage of interstate and state business taken be that of revenue or ton and passenger miles, is ascertained in this way: Add the percentage of extra cost found to exist to the state carriage receipts or percentage thereof and then, after adding thereto the percentages of all other business, reduce the same to a common proportion of 100%. Thus assuming that interstate freight is 75%, state 16% and miscellaneous (undivided) 4% and the extra cost to be 50%, the result would upon a revenue basis be thus ascertained:

Interstate	80%×1	=80=80/108=	74.08
State	16%×1½	=24=24/108=	22.22
Miscellaneous	4%×1	= 4= 4/108=	3.70
		108	100

State freight percentage has thus become 22.22% or 6.22% more than it was on the basis of equal cost. This 6.22 per cent. of all expenses represents the extra cost of doing the state business. The ascertainment was in this way made by the railroad auditors (Ex. 2, Rec., 4798-4802; Ex. 45, Rec., 4955-4957; Ex. 78; Rec., 5032-5035; Ex. 82, Rec., 5052-5054; Ex. 89, Rec., 5039-5072; Ex. 98, Rec., 5093-5094; Ex. 105, Rec., 5111-5114). State expert Taliaferro (Rec., 4566-4568) said that the method thus adopted was correct, if the revenue basis is right. He went into the St. L. & S. F. statement (Ex. 2, Rec., 4798-4802) in detail and thus (Rec., 4567) admitted it to be correct:

> "Q. So these calculations that are made are correct. Let us turn then to schedule 8 of exhibit 2, which deals with the method of reaching that result. That is a correct method, isn't it? What we have called in the record 'The

Sturgis Example?' I will not commit you now to any theory, but if the revenue basis is the method upon which it is to be ascertained, that is the correct method of ascertaining the result, isn't it?

A. Yes, sir."

Again (Rec., 4567-8) he said:

"Q. Now whether you do it upon a revenue theory, or whether you do it upon the ton mile theory, or upon the ton theory, you ascertain your percentages, and ascertain the increased cost in that way, don't you?

A. Yes, sir.

Q. So the court given the proposition, that the revenue basis is the right basis, or that the ton mile basis is the right one, or the ton basis, or the passenger basis, or the passenger per mile basis is the right one, all on earth he has got to do is to take that and figure out the percentages upon those different bases, according to that example which in this record has been repeatedly called the 'Sturgis Example.' Isn't that true?

A. Yes, sir.

Q. So that upon any phase of the case at any time upon any theory that is ever adopted, if it is ever necessary to ascertain the increased cost of doing the state business over the interstate, as to any portion of the expenses even upon any theory, that is the way to do it?

A. Yes, sir."

H. W. Press of the St. L. & S. F. R. Co. made a computation (Rep., 4639) upon the ton (Ex. 68, Rec., 5000) and passenger mile (Ex. 69, Rec., 5002) basis and the examples were done in a like manner. Of course, the ton mile percentage being less than the revenue, the extra cost would be less.

(g) The extra cost, when ascertained at the low percentages of 50% for freight and 25% for passenger business, allows for the extra revenue per mile from the short haul business. So Judge Hook in the Oklahoma case (*M. K. & T. R. Co.* v. *Love*,

493, 499, 500), clearly showed. So the trial judge expressly found (Findings 7, 8, Rec., 5309, 5310). Judge Sanborn delivered the opinion in the Oklahoma case (185 Fed. Rep., 321, 107 C. C. A., 403) affirming Judge Hook. In *Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep., 765, decided ten days later, he said:

> "The master did not rest his final conclusions on this relatively greater cost of intrastate business per ton mile without a careful consideration and credit to the intrastate business of the relatively greater revenue per ton per mile derived from that business, thus reducing the percentage for the freight business in the Northern Pacific case, for instance from 250 per cent. to 173+ per cent., and for passenger business from 115 per cent. to 113+ per cent."

In Arkansas (*In re Arkansas Rates*, 187 Fed. Rep., 290, 320, 344) the allowance for extra freight cost was figured at 210 and 250 per cent. for operating expenses, after ascertaining the equal cost upon a ton mile basis and equaled about 50 per cent allowed upon the basis of revenue.

The extra cost, upon the basis of 50% for freight and 25% for passenger, is clearly shown by the finding 19 (Rec., 5318-5326). It is proven by the railroad auditors, Douglass (Rec., 3779, 3780); Ex. 2, Rec., 4798-4802); Conrad, (Rec., 4449; Ex. 45, Rec., 4955-4957); Nay, (Rec., 4688; Ex. 78, Rec., 5032-5); McCarty, Rec., 4700; Ex. 82, Rec., 5052-5054; Seelig, (Rec., 4714; Ex. 89, Rec., 5039-5072); Sturgis, (Rec., 4743-7; Ex. 98, Rec., 5093-4); Ernst, (Rec., 4746; Ex. 105 Rec., 5111-5114); Worland, (Rec., 4707-8; Ex. 87, Rec., 5060; Smith, Rec., 4725-7, Ex. 93a, Rec., 5085). The calculations are by Taliaferro (Rec., 4566-4568), the state's expert, admitted to be correct and to have been made upon the right basis.

These amounts of extra cost found in the various cases are:

Case Nos.	Railroad	Period	Freight	Passenger
672-3	St. L. & S. F.....	3 months	$131,425.08	$ 53,907.36
674-5	A. T. & S. F.....	6 months	41,859.55	17,947.71
678-81	C. R. I. & P.....	3 months	41,919.82	17,501.61
682-3	K. C. S.	6 months	11,711.60	5,346.15
684-5	St. L. & H.	12 months	12,026.69	2,444.68
690-1	M. K. & T.	6 months	66,590.77	27,482.59
698-9	K. C. C. & S.....	12 months	8,483.30	7,625.00
130-34	C. B. & Q.	12 months	484,129.29	158,205.70
700-1	C. G. W.	6 months	9,347.72	6,090.35

The extra cost would not be affected by the sum allowed upon miscellaneous business, and would be proportionately offset by the increase in assignable value, and revenue proportion of expenses. (See request 22, Rec., 157-165).

The amounts of extra cost as estimated (Rec., 175-212), by the state's experts upon the ton mile basis, at the rate of 30% and 50% respectively, are as follows:

Road	30 per cent	50 per cent
St. L. & S. F.	$59,132.25	$96,270.20
A. T. & S. F.	17,007.81	28,069.80
C. R. I. & P.	12,755.51	20,990.87
K. C. S.	1,885.28	3,142.14
M. K. & T.	27,792.69	45,377.89
C. B. & Q.	187,503.65	306,391.83
C. G. W.	4,037.42	6.165.52

Those of the St. L. & H. (Rec., 196) and K. C. C. & S. (Rec., 207) were not estimated because of the written concession that the rate upon any basis was confiscatory. It therefore may be said that it clearly appears that if the fifty per cent extra cost of state freight allowed by the state (Report of Joint Experts, Rec., 175-212), and to which both state experts testified (Ludlam, Rec., 2005-6; Taliaferro, Rec., 3260, 4593) upon the ton mile basis be fixed,

the extra cost for each road would make the rate upon any road confiscatory and make the net returns: St. L. & S. F. $96,270.20; A. T. & S. F. $41,859.55; C. R. I. & P. $20,990.87; K. C. S. $3,-142.14; M. K. & T. $45,377.89; C. B. & Q. $306,391.83; C. G. W. $6,165.52. This would render all rates confiscatory just as it was in the report of the joint experts, (Rec., 196, 207), conceded to be as to the K. C. C. & S. Nos. 698-9 and St. L. & H. Nos. 684-5. Even the 30 per cent extra cost would as to each road leave a return of less than six per cent. The passenger rate need not be followed separately as that did not, regardless of extra cost, bring a six per cent return.

8. IF THE DIVISION WERE MADE DIFFERENTLY, THE RESULT WOULD BE THE SAME. THE NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA AND OKLAHOMA DIVISIONS WERE BY THE SAME METHOD. THE MINNESOTA AND ARKANSAS DIVISIONS OF EXPENSES UPON FINAL HEARING PROVE THAT THE THEORY ADOPTED BELOW BROUGHT A FAIR RESULT.

(a) In the Nebraska case (*Ames* v. *Union Pacific R. Co.*, 64 Fed. Rep., 165; *Smyth* v. *Ames*, 169 U. S., 540) the expense was thus divided: The percentage of all expenses to all earnings was first ascertained, whereby there was thus obtained the percentage of expenses to earnings upon the assumption that the cost of doing state and interstate business was equal. To this result there was added the percentage over such *equal* cost, *as estimated by the state*, that it cost to do the state business. Applying the total percentage thus ascertained to the state earnings and then deducting same, there resulted the net earnings. In the Nebraska case the state's expert admitted that it cost to do state business from 10 to 20 per cent more than the *equal* cost of doing *all* business. The court said, assuming that to be true, the rates fixed were confis-

catory. This method of ascertaining the net result may be thus illustrated:

Suppose all earnings are $500,000, of which the state part is $100,000.

Suppose the percentage of all expenses to all earnings to be 70% and the cost of doing state business over the *equal* cost of all to be 10%, there should then be also deducted both 70% and 10%, or in all 80%, or	80,000
Leaving net	$ 20,000

Neither party below adopted this theory because the experts did not think there was any satisfactory way to ascertain the extra cost of state over interstate by comparing the state expense with the equal expense of all. The experts agreed (Taliaferro, Rec., 4567-8) that the best way to ascertain the extra cost was to measure it by comparing the state with the interstate instead of with the equal cost, and this was actually done with all calculations. Each auditor gave examples of the method of solving the problem (Ex. 2, Rec., 4798-4802; Ex. 45, Rec., 4955-4977; Ex. 78, Rec., 5032-5035; Ex. 82, Rec., 5052-5054; Ex. 89, Rec., 5039-5072; Ex. 98, Rec., 5093-5094; Ex. 105, Rec., 5111-5114). So neither party undertook to ascertain that *equal* cost upon the basis of percentage of expenses to earnings. These percentages were (Finding 18, Rec., 5318), however, ascertained. If they are in each instance applied to the earnings, the expenses will be found to be the same as appears by the application of the revenue basis actually adopted below. They would appear exactly the same if miscellaneous earnings and expenses had been included. The details of the miscellaneous business, upon the state's theory of division are shown by request 22 (Rec., 157-165). In other words, if the original or equal cost be ascertained upon the basis of revenue or upon the percentage of expenses to earnings the result is exactly the same. The example already taken will illustrate this. Sup-

pose all earnings to be $500,000, of which interstate are $400,000.00 and state $100,000. The entire expenses equaling 70% of the earnings there would, upon the basis of percentage of earnings to expenses, be charged against state earnings 70% as expenses as the first or equal cost. If all expenses are thus $350,000 or a sum equaling 70% of all earnings, the state earnings are upon the basis of revenue charged with one-fifth or 20% of all expenses or $70,000. So in either case the revenue basis is adopted. The only difference between the Nebraska and these cases is in the ascertainment of extra cost. There it was *admitted by the state* to be from 10% to 20% more than the equal cost. Here it was a *controverted* question to be determined by comparing, as between themselves, the state and interstate expenses. The state, here however, admitted the extra cost to be from 30% to 50% estimated upon a ton mile basis. So estimate and the rates are confiscatory.

(b) Generally speaking, any attempt to make the first or equal division referred to in *Ames* v. *Union Pacific R. Co.*, (64 Fed. Rep., 165), *Smyth* v. *Ames*, (169 U. S., 466) *C. M. & St. P. R. Co.* v. *Tompkins*, (176 U. S., 167) and *C. M. & St. P.* v. *Keyes*, (91 Fed. Rep., 47), upon the ton or passenger mile basis and then add a sum for extra cost, results in injustice and is confusing. It is unjust because it does not represent the true or fair division upon the basis of equal cost. It is confusing to so estimate and use a larger multiple of extra cost because it leads one to think that the first division in reality represents a fair equal division. If the original or equal cost is first to be ascertained as indicated in the Nebraska (64 Fed. Rep., 165, 169 U. S. 466) South Dakota (176 U. S., 167) and North Dakota (91 Fed. Rep., 57) cases, and then have added to it the extra expense, it is manifest that such original or equal cost cannot be fairly ascertained upon the ton or passenger mile basis. The court below thought the most satisfactory way was to first ascertain the equal cost upon

a revenue basis, and then add as the minimum extra cost 50 per cent for freight and 25 per cent for the passenger business, because, as found below, all things considered, it brought a fair, representative and just result (Findings 7, 8, Rec., 5311). That the first or equal cost cannot fairly be estimated upon a ton or passenger mile basis is easily demonstrated. The ton mile percentage of state freight of all kinds was far less than the revenue. This clearly appears from the respective statements of the experts upon both sides. Therefore, the equal cost upon the basis of ton miles is far less than upon the revenue basis. Taking the percentages of the ton miles from the statement of the state's experts, and those of the revenue from special finding 17 (Rec., 5315, 5316) corresponding as it does, with the statements of the railroad auditors, conceded by the state to be correct, the results may be thus tabulated:

Case No.	Railroad	Ton mile %	Revenue %
672-3	St. L. & S. F.....	13.10 (Rec. 4988)	20.04
674-5	A. T. & S. F.....	4.34 (Rec. 5025)	6.79
678-81	C. R. I. & P.....	7.61 (Rec. 5043)	18.02
682-3	K. C. S	1.12 (Rec. 5060)	4.38
684-5	St. L. & H.	None appears	61.62
690-1	M. K. & T.	11. (Rec. 5082)	17.01
130-4	C. B. & Q.	10.62 (Rec. 5103)	19.28
698-9	K. C. C. & S.....	None appears	26.29
700-1	C. G. W.	6.9 (Rec. 5120)	11.18

That the ton mile as an original or equal division of cost as between state and interstate freight business is not enough is apparent for this reason: 13.10 per cent is the ton mile percentage of St. L. & S. F. state freight. Applying it to the entire freight expenses (Finding 18, Rec., 5317) of $1,802,813.26 plus freight rentals and taxes of $12,452.04, makes $250,889.75. This to the state freight earnings (*id.*, Rec., 5317) of $577,192.84, makes the relation of equal or first expense to earnings the inconceivably low percentage of 43 per cent, whereas for the whole freight business

of the company it was (*id.*) 65.71 per cent. The same result is shown as to all the companies where the figures appear as shown by the rough tabulation now made by showing the percentage to the expenses (Finding 18, Rec., 5316) upon a ton mile division and also the actual percentage of the total freight earnings shown in findings 17 and 19, (Rec., 5315, 5318):

Case No.	Railroad	Ton Mile %	Ratio of expenses to earnings on such a division	Actual ratio on all freight
672-3	St. L. & S. F.....	13.10	43%	65.71
674-5	A. T. & S. F.....	4.34	36%	68.03
682-3	K. C. S.	1.12	18%	67.07
678-81	C. R. I. & P.....	7.61	34%	82.62
690-1	M. K. & T.	11.00	44%	69.24
130-4	C. B. & Q.....	10.62	45%	82.88
700-1	C. G. W.	6.90	49%	81.04

The state percentage as to passenger miles as given by the state, as compared with the revenue percentages set forth in finding 17 (Rec., 5315, 5316) thus appears:

Case No.	Railroad	Pass. Mile %	Revenue
672-3	St. L. & S. F.....	59.32 (Rec. 4984)	51.17
674-5	A. T. & S. F.....	None appears	15.22
678-81	C. R. I. & P.....	44.28 (Rec. 5040)	42.02
682-3	K. C. S.	25.08 (Rec. 5058)	19.75
684-5	St. L. & H.	None appears	78.04
690-1	M. K. & T.	41.5 (Rec. 5079)	36.66
130-4	C. B. & Q.	45.92 (Rec. 5105)	39.11
698-9	K. C. C. & S.....	None appears	41.95
700-1	C. G. W.	32.06 (Rec. 5117)	29.28

That the passenger mile original division as the basis of original equal cost is unfair to the state is apparent, for this reason: 59.32% is the passenger mile percentage of the St. L. & S. F. Applying it to the entire passenger expense (Finding 18, Rec., 5317) of $974,816.61, plus the passenger proportion of taxes and

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rentals $38,979.63, makes, upon the first or equal division, the state passenger expense $601,383.92. This to the state passenger earnings $599,051.59 makes the relation of expenses to earnings 103 per cent, whereas for the whole passenger business in the state it is (Rec., 5317) but 83.60 per cent. The same result will appear as to all the companies, where the figures appear, as now shown by this tabulation:

Case No.	Railroad	Pass. Mile %	Ratio Exp. on such division	Actual ratio on all passenger business
672-3	St. L. & S. F.....	59.32	103%	83.60
678-81	C. R. I. & P.....	44.28	135%	123.88
682-3	K. C. S.....	25.08	113%	89.97
690-1	M. K. & T.	41.56	97%	85.53
130-4	C. B. & Q.	45.92	100%	85.60
700-1	C. G. W.	32.06	115%	105.79

On such basis the passenger rate, without regard to extra cost, would as to every road but the M. K. & T., bring no return, but bring *actual* loss. With the M. K. & T. the result would be within 3% of actual loss. This result is inconceivable.

It will thus be observed that a division of freight expenses upon a ton mile basis would reduce very considerably the first or equal cost of doing the state business as claimed by the railroads, but so far as concerns the passenger business, the state expenses would be largely and overwhelmingly increased by making the division upon the passenger mile basis. It would not therefore be fair to take either the ton or passenger mile basis to ascertain that first or equal cost so often mentioned by the courts and as to which the whole contest below centered.

(c) This then brings for the consideration the difference between the methods adopted here and in the Minnesota case (*Shep-*

ard v. *Nor. Pac. R. Co.*, 184 Fed. Rep., 765), and at the final hearing of the Arkansas case (187 Fed. Rep. 290). The results are practically the same as those reached below in these cases. That which was done in Arkansas and Minnesota was really to go into the details which led to the ultimate conclusion in the Missouri case. In plain words, the calculations and divisions in both cases lead to the conclusion that a just result is best obtained by dividing all expenses upon the revenue proportion and then adding a *small* percentage of all expenses, as representing the additional or extra cost, after considering and allowing for the greater revenue from short haul business, if any, because there is thereby assigned as state expense such proportion of all expenses as is equitable, just, fair and representative. To prove this final result the *details* can be shown as the trial judge did in the Arkansas case, or as the master did in the Minnesota case. In the end the real question is how much of all operating expenses shall be charged to *any* class of state business, including, all things considered, the extra cost of state over interstate business. Thus, in the Arkansas case the ultimate finding (187 Fed. Rep., 290, 323) was practically that the expenses with extra cost were the same as if the division had been upon the basis of revenue plus 50% extra cost for state freight. For instance (187 Fed. Rep., 350) the revenue percentage of state freight of the St. L. I. M. & S. R. Co. was 13.41, interstate 86.59. Given 50% extra cost and the result would have been:

Interstate . . . . . 86.59×1 =86.59=81.14
State . . . . . 13.41×1½=20.11=18.86

This made the total state cost 18.86 per cent of all freight expenses. It charged 5.45 per cent of all such operating expenses as the extra expense of doing the state freight business over the original or equal cost of 13.41 per cent, ascertained upon a revenue basis. The total freight expenses were (p. 354) found to be $3,432,065.11, of which the total by the court actually charged to freight were $639,944.39, or 18.64 per cent. This total per-

centage, so charged, was practically that which would have been charged upon the revenue basis with 50% extra cost added. In plain words, it made the extra cost over the revenue proportion 5.23 per cent, slightly less than the first or equal division upon the revenue basis, plus 50 per cent for extra cost. The total earnings from state passenger business (187 Fed. Rep. 290, 350) were found and the expenses were charged against them (187 Fed. Rep. 344) upon a revenue basis. In the case of the St. L. I. M. & S. there was allowed 15 per cent as extra cost. In that of the St. L. S. W., there was no extra cost allowed. In these cases below the proof as already seen, overwhelmingly established an extra expense of doing the passenger business. Upon the state's own theory, however, or upon the revenue basis, without any extra cost (Rec. 175-212) the state passenger rates did not equal a six per cent return. It is perfectly plain that in Arkansas instead of *first* ascertaining the original or equal freight cost and then adding the extra expense, the court, in the excess of caution, went into detail and fixed a sum total as all the expenses of the state business. The divisions of expenses made were *some* upon the revenue, *others* upon ton mile basis with 250 per cent extra cost, some still upon other bases. In the case (187 Fed. Rep., 290, 350) there, the revenue division of freight operating expense assigned 13.41 per cent thereof to the state business, upon which basis there were divided the expenses of maintenance of way and structures, traffic expenses and taxes. The maintenance of equipment charged to the state 25.67 per cent and transportation 19.05 per cent, as against what would on the revenue basis have been 13.41 plus extra cost. These were ascertained upon a ton mile division with a multiple of 250 per cent of extra expenses. To the cost of equipment then was applied the revenue percentage of 13.41 per cent plus 30 per cent extra cost. In the end the result was the assignment as state freight expense 18.64 per cent of all freight expenses, or practically the same as a division upon the basis of revenue plus 50 per cent for extra cost.

(d) In Minnesota (184 Fed. Rep. 765) an examination of the master's report shows the results to be practically the same as they were here below.

The master did not find the first and equal cost and *then* add the extra cost, as was done in the Nebraska (*Ames* v. *N. P. R. Co.*, 64 Fed. Rep. 165; *Smyth* v. *Ames*, 169 U. S. 467) South Dakota (*Great Nor. R. Co.* v. *Keyes*, 91 Fed. Rep. 77), North Dakota (*C. M. & St. P. R. Co.* v. *Tompkins*, 176 U. S., 167), Arkansas (*In Re Arkansas Rates*, 163 Fed. Rep., 141) and Oklahoma (*A. T. & S. F. R. Co.* v. *Love*, 177 Fed. Rep. 493; 185 Fed. Rep. 321; 218 U. S. 675; 220 U. S. 618) cases. He did, however, find the revenue percentage of each class of business by which the first or equal cost clearly and indisputably appears. He then divided all expenses by the ton mile percentages of freight multiplied by 250, that which was found to represent the extra cost of state freight and the passenger mile percentages were increased by 15 per cent which was found to be the extra cost of the state passenger business. As to the amount of this extra cost the two sides had largely differed, but the result showed what percentage upon the ton mile and passenger mile basis, as claimed by the state, with extra cost as found by the court, of the total expenses should be charged as the state percentage. He then equated the revenue per ton and passenger mile so as to give credit to the state for the extra amount of revenue per ton mile earned and obtained a result upon the basis of revenue. This, of course, brought exactly the same total percentage. In the Northern Pacific case, it assigned of the total freight expense 25.362 per cent to state freight and 37.347 per cent to state passenger, as against the equal revenue divisions of 16.356 per cent and 34.344 per cent respectively. In the Great Northern case it assigned to state freight 17.99 per cent and to state passenger 53.411 per cent, as against the equal or revenue cost of 15.12 per cent and 48.03 per cent respectively. The master found that if he divided upon a ton and passenger mile basis with extra cost of 2½

times for state freight and 15 per cent for state passenger, the result was *exactly the same* as if he divided upon a ton and passenger mile revenue basis, adding a smaller percentage for extra cost. Thus while the extra cost upon a ton and passenger basis was 2½ times for freight and 15 per cent upon passenger, it was upon the *revenue* per ton mile basis, in the Northern Pacific case freight 73.77 per cent, passenger 13.95 per cent, in the Great Northern case 23.217 per cent freight and 23.78 per cent for passenger. In final results the revenue division being treated as equal cost, the difference between it and the total percentage of all expense would show the amount of extra cost actually allowed, which was:

	Per Cent Allowed	Per Cent Revenue	Extra Cost Per Cent
Freight			
Northern Pacific	25.362	16.356	9.006
Great Northern	17.99	15.112	2.878
Passenger			
Northern Pacific	37.347	34.344	3.003
Great Northern	53.411	48.083	5.328

So in both cases there were allowances of very substantial sums as the extra expense over and above equal cost ascertained upon the basis of revenue. Had the percentages of extra cost in Missouri, 50 per cent for freight and 25 per cent for passenger, been applied to both cases upon the revenue basis, this would have been the result.

Freight	Northern Pacific.
State	16.356x1½=24.534=22.67=5.300 extra cost
Interstate	83.644x1 =83.644=76.57
Passenger	
State	34.344x1¼=42.930=36.207=1.853 extra cost
Interstate	65.656x1 =65.656=63.793

Freight — Great Northern

State . . . . . 15.112x1½=22.668=21.07=4.95 extra cost
Interstate . . . . . 84.888x1 =84.888=78.93

Passenger

State . . . . . 48.03x1¼=60.037=53.63=5.60 extra cost
Interstate . . . . . 51.917x1 =51.917=46.37

The master in the Minnesota case therefore reached practically the same result in detail by dividing upon a ton and passenger mile basis, as contended for by the state and then allowing as extra cost 2½ times for freight and 15 per cent for passenger business. His figures and the methods adopted very clearly show that in Missouri the result there reached was fair, just and representative.

(e) The master then proceeded to reach and obtain his same result upon the revenue basis per ton and passenger mile by equating same so as to charge against the extra cost the extra revenue received per ton mile. Taking for illustration the Northern Pacific case. He there found that there was received for a ton mile .7377 more for the state freight than the interstate and .1395 per passenger mile more for the state passenger business. He reached his result in two ways:

First. He equated the ton and passenger miles by the extra cost of each, reducing them to a common level, thus making the percentage of all state freight operating expenses 25.362 instead of the revenue proportion of 16.356 and the passenger proportion 37.347 instead of the revenue 34.344%.

Second. He equated the cost upon the *revenue* ton and passenger miles by multiplying the state freight revenue by 1.7377 and the state passenger by 1.1395, and the interstate by 1. They were then each reduced to a proportionate part of 100 per cent. This gave 25.362% as the state freight proportion and 37.347% as the passenger, which, of course, was exactly the same as the result

in equating the ton and passenger miles. The master to find how much *more* per ton or passenger mile it cost to do the state than the interstate business, also said that if it cost 2½ times as much to do the state freight business as interstate and the state freight receipts were .4387 per ton per mile more than the interstate, then to equate the same to a common cost the ton mile relation should be divided by the revenue relation thus: 250 ÷1.4387=1.7377, which made the extra cost 73.77% upon the basis of revenue. In this way the extra cost upon the *revenue* basis per ton mile became 73.77% instead of 50% allowed in Missouri as a minimum upon a straight revenue basis. Thus in detail, the correctness of the general results is proven. This because, allowing for extra revenue, the allowance is overcome by extra cost. In the same way the passenger equated extra cost per passenger mile was, in Minnesota, ascertained to be .1395, and this charged to the state passenger business 37.347 of the entire passenger expense, or 3.003 more than the revenue proportion. In the cases below neither side figured out the extra revenue per passenger mile of the state revenue over the interstate. The figures from which this compilation can be made probably appear. Turning for illustration, to the St. L. & S. F. case Nos. 672-3, it appears that there was (Exhibit 64, Rec., 4988), received .7286 per ton per mile from the state more than from interstate freight business. The equation thereof according to the Minnesota case is the result of 250÷1.7286, or 1.44691. This makes the net extra cost upon an equated revenue ton mile basis 44.69%. Applying to the St. L. & S. F. case the example of ascertaining the proportion of operating expenses to be charged to state freight as done in Minnesota this is the result:

State freight	20.04×1.449	=29.04	=26.64
Interstate	76.94×1	=76.94	=70.56
Miscellaneous	3.02×1	= 3.02	= 2.80

This is practically the same as 50 per cent extra cost over the equal cost upon the basis of revenue.

Equating the ton miles as done in Minnesota and leaving miscellaneous freight undivided, the result is practically the same:

State freight . . . . . 13.10×2½=32.75=27.37
Interstate . . . . . 86.90×1 =86.90=72.63

The cost per ton mile of state freight over the like cost of interstate was also estimated by the state as to the A. T. & S. F. (Ex. 76, Rec., 5023) as 66.03; C. R. I. & P. (Ex. 81, Rec., 5043) 75.60; K. C. S. (Ex. 86, Rec., 5006) 68.40, and M. K. & T. (Ex. 92, Rec., 5082) as 76.41. Taking each of these figures and dividing them into 250, the extra cost upon a ton mile basis, the result of extra cost is, upon the basis of ton mile revenue, in the case of the A. T. & S. F., 50.51 per cent, C. R. I. & P., 42.31 per cent, K. C. S., 48.45 per cent, and the M. K. & T., 41.14 per cent. These figures used as divisors are those given by the state experts, and they were presumably ascertained after swelling the state earnings per ton mile by adding the miscellaneous business, increased upon a revenue basis and to which ton miles bore no relation. This, however, as a result of a ton mile revenue estimate, is a demonstration that the court below was not far wrong in the estimate of 50 per cent extra cost upon a straight revenue basis. The method of equation as a test of the ultimate ascertainment is of great value. This because it shows that one reason why the court below cut the extra cost from the expert estimates of twice and three times was that there was an extra revenue for state or short haul business to be equalized with the extra cost. In Minnesota the state freight revenue was, in the Northern Pacific case, for instance, .4387 more per ton mile than the interstate. This was equated by dividing 250 per cent extra cost by 1.4387 and equaled 1.7377, making the extra cost upon the ton mile revenue basis 73.77 per cent. Had the extra cost been figured at 210 and then divided by 1.4387, it would have equaled 1.5012, making practically 50 per cent extra cost after deducting extra revenue.

But the cases were not below tried upon this theory. How the state in these cases arrived at the above figures does not appear. They are now referred to simply to show that the revenue basis plus extra cost brought a fair result below. In the K. C. S., all that appears upon the subject is upon the state's exhibit (Rec., 5060), there is the statement by the state's expert that the ton mileage was by the state's expert ascertained from the company records. In the M. K. & T. (Exhibit 92, Rec., 5082), the state's expert estimates the state ton miles as 11 per cent, the interstate 89, and says he takes the figures from exhibit 89 (Rec., 5070) where they are proven as 140,032,317 total, of which state are 14,769,749. The C. R. I. & P. state exhibit 81 (Rec., 5043) gives the state percentage of ton miles as 7.61 per cent, basing the claim upon the railroad's exhibit 79 (Rec., 5034). In neither case did either party go into the question. Each assumed these percentages to be correct, neither advancing the theory upon which the Minnesota case was decided.

Here the judge below took the estimates of two to four times extra cost given by witnesses, and because of extra state or short haul revenue per mile and other considerations, reduced them to 50 per cent, saying that this as a minimum added to the equal division upon the revenue basis, brought to each road a result that was fair, just and representative. In the end such only is the result which must always be reached. After all we must, as both parties did below, first assume an equal cost and then add the amount found as extra thereto. The sum total represents the part of all expenses to be charged to the state business. This may be done either on the basis of revenue or ton and passenger miles. If ton miles are used the multiple of extra cost is larger (Finding 7, Rec., 5309), the ultimate question being how much of all expenses shall be apportioned to the state business.

9. Miscellaneous Earnings and Expenses.

These earnings consist of miscellaneous freight, such as switching, demurrage and storage, and miscellaneous passenger such as mail and express. When under the act of 1905, an attempt was, by the railroads, made to divide miscellaneous earnings, some objection was made to the method of division. For this reason when the railroads pursuant to the agreed order of June 17, 1909, made up and long before the trial delivered their statements, they made no division of these earnings. This because upon their theory, the result would not be changed either by a division or a failure to so divide. When the trial was actually on, the state for the *first* time made such division upon the basis of revenue from the carriage charge. This was much in favor of the state, for a division according to the facts would have assigned much less to the state earnings. It was, however, too late to get the actual state and interstate returns from that class of business. So in finding 15 (Rec., 5314-5315) it was recited:

> "15. In the statements hereinbefore referred to made and signed by the four experts, while they correctly set forth the figures on both the revenue theory and the ton and passenger mile theory, the placing of the miscellaneous earnings of the passenger business is arbitrarily fixed and does not at all proceed upon the passenger mile basis, but for that the revenue basis is taken and fixed. Such earnings are arbitrarily divided without reference to the facts, the result being the state earnings and especially passenger, are fixed much higher than the actual earnings. Such division instead of following defendant's theory of the ton mile and passenger mile basis. is upon the revenue basis from which it is seen that this (Rec.. 5314) would be a splitting of theories. But from this and from all the evidence it is plain that even the ton and passenger mile basis theory cannot be worked out without showing a loss, to prevent which an arbitrary change of account must be made as to the miscellaneous business. Even in making the arbitrary change the revenue basis is used, and yet the revenue division of expenses insisted upon by complainants is said not to be recognized. This is utterly illogical and unfair, and does

not represent the true facts as to whether such earnings are made at a loss, and there is no reliance whatever to be placed in such method of accounting. In so finding no reflection whatever is made upon the experts for the state, because as before found they are men of the highest character and learning and highly skilled in accounting and with a proper basis for such accounting their work is perfect."

These facts were clearly proven (Press. Rec., 4639, Exhibit 70 Rec. 5004; Nay, Rec. 4645-6, Exhibit 73, Rec. 5017; Taliaferro, Rec. 4768-4771, Exhibit 105, Rec. 5105). But since when divided as the state suggests, it made no difference in results, a statement was prepared in which there is charged the expenses upon a revenue basis, with and without extra cost. The result is as shown by request 22 (Rec. 160-164). These figures will not make any difference in the result of any case because they add to state values, earnings and expenses, freight and passenger, the proper proportions on the basis of revenue. This makes it necessary to allow an *extra* percentage for assignable value, as well as for expense, divided upon the revenue basis, with extra cost ascertained. When this is done, the proportions are not disturbed. In other words, the figures as returned show the assignable value and earnings and expenses of the *carriage* service. No difference results if miscellaneous be returned in the same way. So if the theory of the railroads be adopted, their figures can be absolutely taken as true. If, however, miscellaneous figures be added to the railroad figures, it simply means adding the percentages shown by request 22 (Rec. 160-164) to the assignable value, earnings and expenses. The result in the end will then be the same.

10 FINAL RESULTS.

(1) The value of all the property of each company in the state was found (Finding 11, Rec. 5311), and will be set

forth in the first column of the tabulation now to be made. Six per cent interest thereon for the test or representative period has been calculated and will be set forth in the first column. In the last column from findings 17 and 18 (Rec. 5315-5316) there will be tabulated the *net* earnings in the state from every *conceivable* source the figures agreeing with those in the report (Rec. 175-212) of joint experts. This is the result:

Road		Test Period	6% Interest	Actual net receipts
St. L. & S. F.	$61,238,414.70	3 Mos.	$ 918,576.22	$1,102,875.72
A. T. & S. F.	15,091,212.00	6 "	452,736.36	753,643.51
C. R. I. & P.	19,102,507.59	3 "	286,537.61	34,298.77
K. C. S.	8,039,084.40	6 "	241,172.53	307,589.52
St. L. & H.	1,143,077.02	12 "	68,584.62	15,687.68
M. K. & T.	20,894,229.93	6 "	626,826.89	475,681.23
C. B. & Q.	53,172,907.83	12 "	3,190,374.47	2,014,787.47
K. C. C. & S.	2,380,222.48	12 "	285,626.69	32,500.72
C. G. W.	3,605,236.38	6 "	108,157.09	39,545.77

Every road in the state lost money on all of its business excepting the St. L. & S. F., A. T. & S. F. and K. C. S., that is to say, after deductions from receipts from all sources of the entire expenses and the diminution in freight earnings, there is left less than the return to which the company is entitled. It needs no argument to show that if upon *all* of its business in a state there is not a 6 per cent return, there cannot be any such return upon the state part thereof, which as hereinbefore shown is much more costly than the interstate. The case of the C. M. & St. P. (Nos. 702-3) was to abide the result of the St. L. & S. F. No other case was to abide the result of either of the three cases of the St. L. & S. F., A. T. & S. F. or K. C. S. So that of the 18 cases brought below, 14 of them do not, from *all* sources, receive a 6 per cent return upon their property in Missouri. The state carriage business (Finding 17, Rec. 5315-5316) of the St. L. & S F. was 28.55 per cent; of the A. T. & S. F. 8.87 per cent, and of the K. C. S. 6.75 per cent. The net receipts of the St. L. & S. F. upon all business being $1,102,875.72 are in excess of the 6 per cent return of $918,578.22 only $184,297.50. 28.55 per cent, or

$52,616.93, thereof could, at most, be fairly apportioned to the state carriage business. If there be deducted therefrom the diminution of freight earnings $11,389.27 (Finding 17, Rec. 5318) and the lowest estimate of the state's expert of extra cost, 30 per cent upon the ton mile basis (Joint Report, Rec. 179), or $59,132.25, the part of this surplus chargeable to all state carriage business is far more than gone. The excess of net receipts upon the A. T. & S. F. is (Finding 17, Rec. 5315-5316) the difference between net earnings $753,643.51 and the 6 per cent return, $452,736.36 or $300,907.15. Of this the state carriage proportion is 8.87 per cent, or $26,690.47. If there be deducted the diminution of state freight earnings $13,885.87 (Finding 19, Rec. 5319) and the state expert's minimum thirty per cent extra cost upon a state freight alone (Rec. 184) $17,007.81, the surplus is wiped out. The excess of net receipts upon the K. C. S. is (Finding 17, Rec. 5315-5316) the difference between them, $307,589.52 and the 6 per cent return of $241,172.53, or only $63,416.99. Of this, the entire state carriage portion is 6.75 per cent, or $4,280.64. The diminution in freight earnings (Finding 19, Rec. 5321) was $2,957.58. The lowest figure fixed by the state's experts (Joint Report, Rec. 194) was $1,883.28 for the extra cost upon state freight alone. Thus again the surplus is wiped out and all profit gone. All this results from a consideration of the entire business in the state *and allowing no extra cost for the state passenger business*. It merely foreshadows the result when the actual divisions of business are considered together with the allowances for extra cost as established by the evidence. To this attention will be next given.

(2) The final results upon theories adopted below are set forth in finding 19 (Rec., 5318-5326). They were found in accordance with the principles hereinbefore advanced and with the extra cost estimated at 50% for freight and 25% for passenger in excess of the original or equal basis of cost. The St. L. &

S. F. is the only road receiving returns upon both classes of business, it receiving upon freight 2.29% and upon passenger 1.16%. The only other roads receiving any returns are the K. C. C. & S., which received 1.36% upon freight and the M. K. & T., .72% upon passenger business. Every other road had a deficit as to each class of business.

The results thus appearing as to each road upon each class of business are:

STATE FREIGHT.

Number of Case	Road	Test Period	Return Road is entitled to	Net Return in fact	% of Return Obtained
672-3	St. L. & S. F.	3 Mos.	$130,988.97	$ 49,973.00	2.29%
674-5	A. T. & S. F.	6 "	23,089.35	10,697.72	Def. 0.00%
678-81	C. R. I. & P.	3 "	38,911.81	25,911.15	Def. 0.00%
682-3	K. C. S.	6 "	8,923.38	1,921.38	Def. 0.00%
684-5	St. L. & H.	12 "	28,694.05	433.65	Def. 0.00%
690-1	M. K. & T.	6 "	75,469.96	1,552.52	Def. 0.00%
130-34	C. B. & Q.	12 "	409,325.04	338,099.20	Def. 0.00%
698-9	K. C. C. & S.	12 "	22,564.51	5,111.58	1.36%
700-1	C. G. W.	6 "	8,057.70	5,721.90	Def. 0.00%

STATE PASSENGER.

Number of Case	Road	Test Period	Return Road is entitled to	Net Return in fact	% of Return Obtained
672-3	St. L. & S. F.	3 Mos.	$135,857.42	$ 26,330.13	1.16%
674-5	A. T. & S. F.	6 "	17,068.16	2,313.35	Def. 0.00%
678-81	C. R. I. & P.	3 "	29,599.34	44,948.90	Def. 0.00%
682-3	K. C. S.	6 "	7,355.76	2,151.93	Def. 0.00%
684-5	St. L. & H.	12 "	17,179.40	4,886.53	Def. 0.00%
690-1	M. K. & T.	6 "	67,070.48	8,070.60	0.72%
130-34	C. B. & Q.	12 "	417,620.02	33,450.99	Def. 0.00%
698-99	K. C. C. & S.	12 "	23,892.67	17,577.91	Def. 0.00%
700-1	C. C. G.	6 "	10,545.32	8,294.55	Def. 0.00%

Upon the combination of freight and passenger earnings there is no sufficient return because the St. L. & S. F. is the only road which receives anything upon both, and in each instance it is less than 6%.

(3) Turning again to the figures of each company, it may be observed: It has already been demonstrated (Statement Div. 26, subdiv. 4, 6; argument Div. III, subdiv. 2, par. b, subdiv. 3, par. c; subdiv. 5, par. e, f, g; subdiv. 6, par. b, c; subdiv. 7, par. c, d, e, f) that there is no difference between the parties except as to theories. At the expense of repetition some things may be again stated.

(a) As already seen, the facts bearing emphatic repetition, the accounts and figures of each company were, long previous to trial, given to the state's experts for verification who "had all the time desired" (Finding 5, Rec., 5308) and found to be absolutely correct, either by an actual examination of the railroad records or by an acceptance of their correctness (Ev. Taliaferro, Rec., 4566, 4573, 4580, 4705, 4706, 4722, 4767, 4773). Every courtesy was extended and every facility afforded for the state's experts to ascertain the facts (Ev. Taliaferro, Rec., 4557, 4558; Hamilton, Rec., 4634).

(b) If expenses were as between state and interstate business divided upon a revenue basis, then the rates questioned were undoubtedly confiscatory (Ev. Taliaferro, Rec., 4556-4598, 4767-4773). The freight rates under the act of 1907 were correctly ascertained. If they are confiscatory it necessarily follows that those under the act of 1905 must fall (Ev. Douglass, Rec., 3776; Peabody, Rec., 4409; Sturgis, Rec., 4746; Taliaferro, Rec., 4409, 4566, 4772). This fact, independently of the evidence, was *actually conceded* at the trial (Finding 4, Rec., 5308).

(c) Regardless of what may have been the facts under the law of 1905, or at the hearing before the master, the books, accounts and figures of each company presented *upon the oral hearing*, as to the rates fixed by the acts of 1907 were absolutely correct and so conceded to be. Not only was such the evidence of each auditor and accountant of each railroad company, but the

expert of the state so testified, as will readily appear from the references about to be made.

(d) Case Nos. 672-3, St. L. & S. F., Alexander Douglass (Rec., 3767-3815; 4178-4194, 4635-4638), vice president and general auditor, and H. W. Press (Rec., 4478-4480; 4638-4644), his assistant, went into every detail of the accounts of their company, producing various statements of figures which had been from time to time given to the state's expert (Rec., 3770) for their verification from the books of the company and of which figures they never made (Rec., 3770, 3771) complaint. Among the statements so offered was exhibit 2 (Rec., 4790) showing the earnings and expenses for three months from July to September, 1907, inclusive, with some divisions and classifications shown by exhibits 3 (Rec., 4804), 8, 9 and 10 (Rec., 4898, 4900, 4902); also exhibit 57 (Rec., 4970) for the six months ending December 31, 1907.

The state's expert Taliaferro (Rec., 4558-4559, 4565-4568, 4573) not only conceded the figures to be right but expressly (Rec., 4573) testified that they were.

(e) Case Nos. 674-5, A. T. & S. F., A. L. Conrad (Rec., 4448-4456), auditor of the company, and James Peabody, chief statistician (Rec., 4652-4662; 4683-6) likewise testified as to the correctness of the figures of that company which had been submitted to and the books checked by the state's experts. Exhibit 45 (Rec., 4939) was a detailed statement of the earnings and expenses for a six months' period and accords with the special findings. To this Mr. Taliaferro, the state's expert (Rec., 4671, 4672) expressly agreed.

(f) Case Nos. 678-81, C. R. I. & P. Frank Nay (Rec., 4687-4697), its general auditor, testified as to the figures of the C. R. I. & P. Co., producing exhibit 79 (Rec., 5026, 5037) showing in detail the figures as to this company. Its correctness was not challenged but conceded by Mr. Taliaferro (Rec., 4697).

(g) Case Nos. 682-3 K. C. S. The accounts of the company were proven by its general auditor, R. J. McCarty (Rec., 4698-4702), who produced exhibits 82 and 83 (Rec., 5043, 5055) and testified to their correctness, the figures having theretofore been given to the state's expert, Taliaferro, for verification, who, in testifying, conceded (Rec., 4705-6) them to be correct. He relied on the auditor's figures in his own statements (Rec., 4705).

(h) Case Nos. 684-5, St. L. & H. J. M. Worland, auditor of this company, testified (Rec., 4707-4708) to the correctness of his statement, producing exhibits 87 and 88 (Rec., 5060, 5064). The state's experts, Taliaferro and Hamilton, did not testify as to this road, but they were two of the four experts selected by the court by consent (Rec., 174). They not only approved (Rec., 196) the figures as presented but confessed confiscation by adding the words:

> "It is apparent from the results above shown that upon neither the revenue nor the ton mile and passenger theory can any adequate return on the investment be earned."

(i) Case Nos. 690-1, M. K. & T. W. L. Seelig, general auditor of the company, proved (Rec., 4713-4722) the correctness of the figures set forth in exhibit 89 (Rec., 5065). The state's expert Taliaferro, did not deny, but accepted and used (Rec., 4722) these figures as correct.

(j) Case Nos. 130, 134, C. B. & Q. The statements of this company (Exhibits 98-102, Rec., 5090-5105) were fully proven by its general auditor, C. I. Sturgis (Rec., 4743-4762, 4773). They were admitted to be correct by the state's expert (Ev. Taliaferro, Rec., 4767-4772, 4774; Exhibits 103-105, Rec., 5101-5105).

(k) Case Nos. 698-9, K. C. C. & S. E. M. Smith, of this company (Rec., 4725-4742), testified to the figures of his account, producing exhibits 93 and 93a (Rec., 5080, 5082). The state's

expert did not testify as to this company, but he and his associate, Hamilton, signed a statement (Rec., 196) acknowledging the correctness of the road's exhibits and as in case Nos. 684, 685, St. L. & H., stated:

> "It is apparent from the results above shown that upon neither the revenue nor the ton mile and passenger mile theory of expenses can any adequate return on the investment be earned."

(l). Case Nos. 700-1, C. G. W. H. Ernst, auditor of this company (Rec., 4776-9), testified as to statements produced as exhibits 106 and 107 (Rec., 5106, 5115). The state's expert did not testify upon this subject, but accepted and adopted the figures (Rec., 4779) producing exhibits 108, 109 (Rec., 5115, 5118), basing his theory thereon.

(m) The remaining cases not tried were Nos. 676-7 (St. L. & S. W.), 686-7 (Mo. Pac.), 688-9 (St. L. I. M. & S.), 692-3 (Q. O. & K. C.), 694-5 (Wabash), 696-7 (St. J. & G. I.), 702-3 (C. M. & St. P.), and 704-5 (C. & A.), which were to abide the result of others. Thus that of the St. L. S. W. (Nos. 676-7) was (Rec., 4686) to abide that of the St. L. I. M. & S. (Nos. 688-9); those of the Mo. Pac. (Nos. 686-7), St. L. I. M. & S. (Nos. 688-9), Wabash (Nos. 694-5) and C. & A. (Nos. 704-5) were (Rec., 4712, 4713, 4723, 4724) to abide that of the C. B. & Q. (Nos. 130, 134); those of the Q. O. & K. C. (Nos. 692-3) and St. J. & G. I. (Nos. 696-7) that (Rec., 4723, 4724) of the C. G. W. (Nos. 700-701); and that of the C. M. & St. P. (Nos. 702, 703) that (Rec., 4724) of the St. L. & S. F. (Nos. 672-3). Thus eight cases below comprising sixteen here, are not now involved. If the cases of the C. B. & Q. (Nos. 130, 134), C. G. W. (Nos. 700, 701) or the St. L. & S. F. (Nos. 672-673) should be reversed, then and in that event only, would arise the question as to what should be done as to the decrees therein. No right was reserved to either road or

the state to appeal nor was either to abide the result of the other cases upon appeal. The effect to be given to the stipulations therein, is alone for the court below.

11. C. B. & Q. CASE Nos. 130, 134, SPECIALLY CONSIDERED IN VIEW OF THE STATE'S FORMER BRIEF THEREIN AND THE THEN UNSUCCESSFUL ATTEMPT TO PRESENT THAT CASE BEFORE THE OTHER SEVENTEEN WERE HEARD.

(a) At the former argument of the C. B. & Q. case (Nos. 130, 134) some criticisms were made of the accounts of *that* company for the year ending June 1, 1908. There is no force therein when the record is understood. There was adopted below a test and representative period of one year ending June 1, 1908. The accounts for that period were presented to the state and by it adopted. Upon the former argument here, however, there was a manifest attempt to abandon all that had been done below, and make the C. B. & Q. case rest upon the figures given for the years ending in 1904 and 1905. The only inquiry ever had in relation thereto was in the *abandoned* reference of the case of the *lessee* road, under a law long since repealed. The effort was however so determined that one might well suspicion an ulterior purpose to force the C. B. & Q. to hearing first, so as to use those figures and not those adopted by the state's expert at the final trial. We have been advised that the *old* briefs of the state in the C. B. & Q. case will be again used here, instead of counsel now writing one brief applicable to all the cases. For these reasons there will, at the expense of some detail, be now made a review of the situation as to the C. B. & Q. practically as was at the former hearing set forth in a reply brief.

(b) Mr. Sturgis, the general auditor of that company, had been examined and cross-examined before the master at great

length, and inquiry had been made as to every detail of expenses and earnings for the years 1904 and 1905. Statements were submitted of the earnings and expenses for those years, with the details of nearly every part thereof. (Ev. Sturgis, Rec., 229-425; Crosby, Rec., 555-558, 578-604; Ex., 4-10, Rec., 1257, 1273.) The state's expert admitted the correctness of the figures, claiming only, in one or two minor respects, that certain sums should not be credited to state earnings or charged as state expenses. (Cross-ex. Fisher, Rec., 826-846.) The only substantial difference at that time between the parties was whether the original division of expenses should be upon the ton mile or revenue basis, and what, if any, extra cost there was in doing the state business over the interstate. This was made plain by Mr. Sturgis, who prepared Exhibit 42, giving in detail a final statement (Rec., 1447-1458) clearly showing that after allowance was made for every correction claimed, the freight rates fixed by the act of 1905 were confiscatory if, as between state and interstate business, expenses were to be divided upon the revenue basis, and if it cost more to do the state than the interstate business.

(c) After the supplemental bills were filed in June, 1907, the state experts had every facility furnished and every courtesy extended, and every opportunity was given them to examine the books. Statements were furnished to the state by the railroad company which were verified by thorough examination of the books by the state experts; a test period was agreed upon between the parties and the state experts given all the time desired for investigation. (Findings 4, 5, 6, Rec., 5307-5308; Ev. Taliaferro, Rec., 4557-4558; Ev. Hamilton, Rec., 4634.) Such examination was actually made (Ev. Taliaferro, Rec., 4495-4499, 4525-4527), so that as to each and every item of the accounts, the state was fully posted and was familiar with the entire situation. It thus became wholly unnecessary to burden the court with more than a general statement. The details were immaterial, since general results were

conceded. When the case closed, *by agreement of the parties* (Order, Rec., 174; Finding 14, Rec., 5311) two experts upon each side went over all of the evidence, facts, and figures, spending (Finding 14, Rec., 5312; Opinion, 5300) some days alone with the judge below. They furnished and filed with the court statements (Rec., 175-212) to which no exceptions were taken, and the figures in which were adopted in the court's finding.

When the judge below made his findings, he requested each party to call his attention to any mistake, error, or inaccuracy, giving thirty days for the purpose (Findings 17, 20; Rec., 5315, 5327). The state refused to take advantage of this offer, and never made a suggestion of any error, inaccuracy, or mistake. Even the assignments of error called no attention thereto. An appeal was not taken until after an unsuccessful effort had been made in the state court to evade the decree entered below (*State ex rel.* v. *Williams*, 221 Mo., 227).

The court below asked the state to submit requests for findings (Rec., 5305), to the end that every fact claimed by it might, if justified by the evidence, be made part of the record. This the state refused to do.

In June, 1905, the state refused to dispute a single fact claimed as to confiscation, and submitted the applications for temporary injunctions upon the cases as made by the eighteen roads, thereby in effect confessing that the state freight rates should be enjoined. It consented to nominal injunction bonds without sureties (Order, Rec., 19). In June, 1907, the state actually consented (Opinions, Rec., 5239, 168 Fed. Rep., 359; Finding 6, Rec., 5329) to temporary injunctions as to the freight rates, under the act of 1907, and this without any further bond than that theretofore given in a nominal amount, without surety (Order, Rec., 61). This was after *full* investigation had been had before the master. This was a clear indication that so far as concerned the freight rates there was no hope of any successful showing that they were reasonable.

In June, 1907, the state defeated a temporary injunction (Rec., 61; Opinion, Rec., 5330; Finding 6, Rec., 5308) as to the passenger rate, so as to be permitted to have it tested by actual experience. In June, 1908, it (Rec., 114) obtained a *further* postponement to make *further* examination, agreeing, in consideration therefor, that the master should be discharged and the eighteen cases should be set for final hearing upon the merits before the court, beginning in October. The cases, upon final hearing, were called in their order, and the trial of each completed before the next case was begun.

The St. L. & S. F. (Nos. 672-3) was the first case on the docket. Extended inquiry as to that road was then made, not only as to the state of its accounts for the entire year ending July 1, 1908, but to the quarterly divisions thereof (Rec., 3767-4650; exhibits 2, 3, 8, 38, 55, 58, 59, and 73, Rec., 4790, 4804, 4898, 4931, 4969, 4977, 4980 and 5017.) Proof was made that the making of the 2-cent passenger rate in nowise increased the travel, elaborate details in figures and statistics, by way of comparison, being furnished (Ev. Nay, Rec., 4456-4477; Stone, Rec., 4480-4487; Peabody, Rec., 4408-4447; exhibits 38, 39, 40, 47, 52, and 59, Rec., 4931, 4933, 4934, 4960, 4964, and 4980.) It was shown that the expenses of doing business had increased very considerably with the last two or three years, while earnings had almost been at a standstill. (Ev. Eustis, Rec., 4367-4389; Bethard, Rec., 4077-4098; McPherson, Rec., 4276-4366; Peabody, Rec., 4404, 4448.) These witnesses produced statements showing in detail the facts to which they thus testified (Exhibits 5, 31, 32, 33, 34, 43, and 53; Rec., 4821, 4926, 4928, 4929, 4938, and 4964.) Not a single fact thus proven was ever controverted.

It was clearly shown that the reduction in the state rate had caused a great reduction in earnings, state and interstate (Exhibits 56, 58; Rec., 4970, 4977.) Much expert evidence was offered to the effect that the expenses as between state and interstate business should, to ascertain the original and equal cost, be

divided upon a revenue basis (Ev. Doddridge, Rec., 3815-3828; Gray, Rec., 3929-4034; Haile, Rec., 4035-4076; Bethard, Rec., 4099-4139; Whitenton, Rec., 4140-4166; Ellis, Rec., 4194-4275; McPherson Rec., 4276-4366; Kendrick Rec., 4300-4403.)

It was also shown that it cost much more to do the state than the interstate business, not, as contended by the state, that the extra cost was confined to local as distinguished from state business (*id*). Included in this proof of extra expenses were shown the results of actual experiments, demonstrating the fact beyond doubt. (Ev. Ellis, Rec., 4194-4295; Exhibits 11-28, Rec., 4905-4922; Ev. Kimbell, Rec., 4167-4177; Exhibit 6, 4821; Peabody, Rec., 4404-4447; Exhibits 39-40, Rec., 4933-4934.) Proof was also made that the value of the property of the company was at least as much as that estimated by the state assessing board (Ev. Doddridge, Rec., 4487.) When the case for the complainant was thus made, the state called two experts (Taliaferro, Rec., 4490-4597, and Hamilton, Rec., 4598-4637), who, upon cross-examination, admitted to be correct the statements of expenses and earnings, the only substantial difference between the parties being, according to their testimony, whether expenses as between state and interstate business should be first divided upon the basis of revenue and the extent of the extra cost of doing the state business over the interstate.

There were then called in their numerical order below the cases of the A. T. & S. F. (Rec., 4651-4685), C. R. I. & P. (Rec., 4686-4697), K. C. S. (Rec., 4698-4705), St. L. & H. (Rec., 4706-4711), M. K. & T. (Rec., 4713-4723), K. C. C. & S. (Rec., 4725-4722) . In each of these instances the complainant called its auditor to prove its earnings and expenses, and the distribution thereof, offering no other proof in addition to that offered in the St. L. & S. F. case, except that in some instances complainant called one witness as to the value of the property. As in the other cases, the state's experts expressly admitted the statements to be correct, and that the only difference was as to the method of dividing expenses between state and interstate

business and the amount of extra cost. When the C. B. & Q. case was reached the same course was adopted as to the additional evidence for and against it (Rec., 4743-4774). Then followed the evidence in the case of C. G. W. (Rec., 4775-4780). In the meantime, there were submitted, to abide the result of certain other cases, those of the St. L. & S. W. (Rec., 4687), Missouri Pacific (Rec., 4712), St. L. I. M. & S. (Rec., 4713), Wabash (Rec., 4737), Q. O. K. C. (Rec., 4723), St. J. & G. I. (Rec., 4724), C. M. & St. P. (Rec., 4724), C. & A. (Rec., 4724).

When the C. B. & Q. case was reached, Mr. Sturgis was called to submit certain general accounts which had been furnished to the state, and as to which it had examined the books of the company, having for the purpose all the time desired. As to the general figures in this statement, there is no dispute whatsoever. The state's expert upon cross-examination, admitted the same to be correct, and practically conceded that if the expenses were, as between state and interstate business, divided upon a revenue basis, both the freight and passenger rates were confiscatory. He referred in his cross-examination to the St. L. & S. F. case (Rec., 4767), where the same admissions were made as to that road (Rec., 4573, 4579), saying that what he there said was applicable to the C. B. & Q. It remained with counsel for the first time upon the former argument here to contend that this court should, by suspicion, condemn the case and say that the expense account was in some mysterious way padded; that each part of the general statement should have been itemized, because of the presumption that the rates were reasonable and that the burden was upon the railroad company to prove each and every detail which entered into the general summary submitted, although the same had been satisfactorily examined by its own experts in their own way and at their own convenience. Such suspicion is not here warranted, nor can such rules be invoked, because the statements had been in the possession of and by the state experts, they compared them with the books of the company, and had

for the purpose, all the time desired. Every facility was furnished and every courtesy extended. The period covered thereby was by both sides adopted below as sufficiently representative for the purposes of the cases, and finally, *by consent of the parties,* two experts from each side, with the judge below, went into the entire question and filed a return of their joint efforts, the figures in which accorded with those in the findings. The figures thus submitted were exactly the same as used (Exhibits 103, 104, 105, Rec., 5101-5105) by the state expert in submitting his statements as to the C. B. & Q.

With these suggestions, we turn now to the earnings and expenses of this road to see if they are subject of the criticism made.

(d) The miscellaneous earnings of the C. B. & Q. for 1908 were not in the general summary divided as between freight and passenger, state and interstate business.

As shown by Mr. Sturgis (Exhibit 98, Rec., 5090), the total earnings were:

Freight and miscellaneous	$8,927,630.81
Passenger	3,389,491.19
This made the total earnings	$12,317,112.00

It appears (Rec., 5091), that the miscellaneous was 7.24 per cent of all, or $891,759.63. Hence, the figures can be thus recast:

Freight, 65.24 per cent	$8,035,690.39
Passenger, 27.52 per cent	3,389,671.97
Miscellaneous (undivided) 7.24 per cent	891,759.63
Making a total of	$12,317,121.99

Now, turning to the state's expert's exhibits, 103, 104, and 105 (Rec., 5101-5105), summarized in exhibit 105 (Rec., 5105), this is the result:

Freight	$8,035,229.51
Miscellaneous freight	161,379.41
Passenger	3,389,481.19
Mail, express, etc	731,021.89
This makes a total of	$12,317,112.00

This practically corresponds with findings 17 and 19 (Rec., 5315-5317, 5324). Finding 17 (Rec., 5315-5316) still further divides these figures, thus giving the percentages to the C. B. & Q.:

(a) Freight earnings.		% of all freight.	% of all earnings.
Interstate freight	$6,554,699.87	78.75	52.40
State freight	1,580,529.64	19.28	12.83
Miscellaneous freight	161,379.49	1.97	1.31

(b) Passenger earnings.		% covering all passenger	% of all earnings.
Interstate passenger	$1,777,788.27	43.15	14.43
State passenger	1.611.702.92	39.11	13.09
Mail, express, etc	731,021.89	17.74	5.94
	$12,317,122.08		

The joint report (Rec., 206) of the four experts selected (Rec., 174) by consent only gives the state freight and passenger proportion of revenue. These figures agree with the foregoing, for they show:

State freight (Rec., 201, 204)	$1,580,529.64
State passenger (Rec., 201, 204)	1,611,702.92

So the state's expert (Rec., 4767, 4768) testified that there was no objection to the statement of the earnings. It may therefore be assumed that the state earnings as found are correct.

So far there had been no division of the miscellaneous, and mail and express, as between the state and interstate business.

The state's experts (Ex. 105, Rec., 5105), however, thus divided the entire earnings:

	Interstate.	State.
Freight	$6,454,699.87	$1,580,529.64
Miscellaneous freight	129,636.08	31,743.33
Passenger	1,777,788.27	1,611,702.92
Mail, express, etc.	383,420.98	347,600.91
	$8,745,545.20	$3,571,576.80
Total		$12,317,122.00

This coincides with the finding below, and gives exactly the same gross figures for the state freight and passenger business as were found (Rec., 5374) below and the same gross earnings, which correspond with the subdivided earnings as given by Mr. Sturgis in Exhibit 98. The findings state (Rec., 5308) and the state's expert (Taliaferro, Rec., 4767-4773) testified that there was no dispute as to the earnings. This ought to end any further inquiry in that direction.

(e) An itemized account of all expenses of the C. B. & Q. was given by Mr. Sturgis in exhibit 98 (Rec., 591), and the aggregate was $10,301,534.53. He divides this as between freight, passenger and miscellaneous, upon a revenue basis. The percentage as to the passenger is misprinted as 25.52, when the results show it should be 27.52, because the whole percentage of all the expenses equals the sum assigned as the total passenger expenses. Every other auditor divided, as between freight and passenger business, by locating as nearly as possible to which of the classes the expenses belonged, and when it could not be located, by dividing upon a revenue basis. The percentage of earnings and expenses is always greater in the case of passenger than freight. This is shown (Finding 18, Rec., 5317) in the other cases. When the evidence was taken under the act of 1905, there was no question as to the passenger earnings. The C. B. & Q. made divisions upon a revenue basis, and it was then accepted as correct. To be consistent and have his former testimony understood, it was better to so divide the expense. This was acceptable to the state, whose experts had examined the books, had every facility offered, every courtesy extended, and all the time desired

for the purpose. Moreover, the testimony shows that this method was much more favorable to the state than the other method of division adopted by the other roads (Finding 18, Rec., 5317). This was admitted by the state's expert (Rec., 4774-4775). According to the division made, these expenses were undivided as between state and interstate business (Ex. 98, Rec., 5091), thus:

Freight	$ 6,720,721.11
Passenger	2,834,982.29
Miscellaneous, undivided	745,831.13
Total	$10,301,534.53

The total expenses distributed in the same form by the state expert (Exhibits 103, 104, Rec., 5102-5104) are:

Total freight expenses (Ex. 103, Rec., 5102)	$ 6,793,610.60
Total passenger (Ex. 104, Rec., 5104)	3,527,311.81
Total	$10,320,921.41

The insignificant difference between this total and that submitted by Mr. Sturgis is claimed to be made up by charging as against expenses certain rentals which also ought to be credited to the earnings; whereas, in the accounts of the railroads, the rentals paid and received were, so far as they would, permitted to balance and offset each other, so as not, to that extent, enter into the accounts. The Interstate Commerce Commission requires the accounts to be so kept. The state, however, through oversight, did not credit the earnings. The court, in its finding (Rec., 5324), added the net amount thereof. The state then attempted to further deduct from the expenses the net result of the division of the rentals upon a mileage basis, instead of the method in which they had been divided, no satisfactory reason being given therefor. The result was he deducted from gross freight and miscellaneous freight expenses $127,864.22, and from the gross passenger, mail and express expenses, $128,736.67. When subdivided so as to apportion to state business the proper part thereof, the amount is so in-

significant as not to affect the result. It may, therefore, be assumed that the court below was right in saying (Finding 6, Rec., 5300) that there was no difference between the parties as to the total amount of expenses.

The report of the four experts (Rec., 201-204), acting by consent, so showed.

Suggestions based wholly upon suspicion are made that the percentage of expenses (including taxes) to earnings were too high, being for the C., B. & Q. (Finding 18, Rec., 5317) in freight 82.88 per cent, and passenger 85.60 per cent. As to all the roads whose cases were tried the percentages (*id.*) were:

	Freight per cent	Passenger per cent
St. L. & S. F.	65.71	83.60
A., T. & S. F.	68.03	85.01
C., R. I. & P.	82.62	123.88
K. C. S.	67.07	89.97
St. L. & H.	86.80	104.64
M., K. & T.	69.24	85.56
C., B. & Q.	82.88	85.60
K. C., C. & S.	63.17	126.91
C., G. W.	81.04	105.79

The total earnings of the C., B. & Q. in Missouri were $12,317,122; the total expenses were $10,301,534.53. The percentage of expenses to earnings was 83.63.

Upon the entire system for 1908 the percentage of the C., B. & Q. was (Rec., 4762) 74 per cent; in Missouri in 1905 (Rec., 4748) it was about 66 per cent. The increases in percentage in 1908 are, since 1905, less than 20 per cent. When the facts were understood there was nothing abnormal about this. The reason for the increase is said by Mr. Sturgis to be accounted for by the natural increase of cost of material and labor, the fact that there had not been a corresponding increase of earnings, and because the Interstate Commerce Commission made many new requirements as to charging certain things to expenses and apportioning the latter. Nearly all of this increase in percentage as to the passenger busi-

ness is accounted for in Missouri because the rates in question decreased state passenger business (Finding 14, Rec., 5313) $394,878.77, and interstate (*id.*) $261,566.41, a total of $656,445.21, about 24 per cent of the gross state passenger earnings. Ordinary expenses increased very greatly (Ev. McPherson, Rec., 4276-4360; Bethard, Rec., 4077-4098; Peabody, Exhibits, Rec., 4404-4448). The percentage will increase very rapidly if the earnings decrease by the state's lowering the rate, as was the case here, and the expenses in the meantime increase. Here, it is claimed, the percentage increased from 16 to 20 per cent in four years (Rec., 4753). The state's expert found no criticism of any item in the amount of the expense, though the closest attention had been given thereto and a full investigation had. In the supplemental brief filed here at the formal hearing an estimate is made by counsel that 75 per cent would be fair. As to passenger business an ingenious argument fixes it as 74 per cent, though the lowest percentage in Missouri was (Finding 18, Rec., 5313) in the case of the St. L. & S. F., 83.60 per cent. But if the expenses were charged at percentages 25 per cent less for freight and at 74, being 11.56 per cent less for passenger, it would not change the result. This is readily seen by taking from the deficit found a sum equal to these differences in percentages. Thus, 25 per cent of the state freight earnings, $1,580,529.64, is $395,132.41. The deficit found in state freight is the net loss of $338,099.20, plus the return to which the railroad is entitled, $409,325.04, of a total of $747,424.24. From this sum, the 25 per cent, $395,132.41, if deducted, would still leave a deficit of $342,291.83. So, 11.56 per cent difference in state passenger percentages applied to the earnings, $1,611,702.92, equals $187,279.87, while the net loss of $33,450.99 plus the return, $417,620.02, to which the road was entitled, equals $451,071.01. From this, the 11.56 per cent, or $187,279.87, if deducted, would still leave a deficit of $263,781.14. Indeed, if the percentages of expenses to earnings be arbitrarily fixed in the case of freight at 37 per cent, and in the case of passenger at 65 per cent, unheard-of figures, and the expenses as found by the court or

stated by Mr. Sturgis be rejected, the result would still show confiscation. Making up from the findings (Rec., 6324) a statement along this line, this is the result:

	Freight	Passenger
State earnings	$1,580,529.64	$1,611,746.71
Add credit balance of taxes and rentals	2,487.99	2,798.50
Total state earnings	$1,583,017.63	$1,614,545.21
For expenses deduct 37 per cent for freight and 65 per cent for passenger	585,716.52	1,049,454.38
Leaves	$ 997,301.11	565,090.83
Less diminution in earnings	112,533.71	
	884,767.40	
Extra cost	484,129.29	158,205.70
	400,638.11	406,885.13
Return to which road is entitled	409,325.04	417,620.02
Deficit	$ 8,686.93	$ 10,734.89

In the former supplemental brief counsel say that the percentages should be arbitrarily fixed at 75. Fixing the expenses on this basis, the result would be:

	Freight	Passenger
State earnings	$1,580,529.64	$1,611,702.92
Add credit balance of taxes and rentals	2,487.99	2,798.50
Making	$1,583,017.63	$1,614,545.21
Deducting 75 per cent claimed by the state as expenses	1,187,263.23	1,210,908.91
Leaving	$ 395,754.40	$ 403,536.30
Less diminution in earnings	112,533.71	
Leaving	$ 283,220.69	
Extra cost deducted	484,129.29	158,205.70
Leaves loss	$ 200,908.60	
Leaves gain		$ 245,330.60
Net return to which the company was entitled	409,325.04	417,620.02
Total loss	$ 610,233.64	$ 172,289.42

The same arguments could be applied to every road, for if the percentage of expenses to earnings be fixed at 75 per cent arbitrarily, every road in the state, excepting the A. T. & S. F., will fail to get a 6 per cent return; at a minimum of extra cost its return will be much less. This will clearly appear from this table, allowing nothing for extra cost, but deducting for expenses 75 per cent of gross earnings and the freight diminution had the laws been enforced:

	Freight	Passenger	Combined
St. L. & S. F.	$132,908.75	$ 92,171.85	$225,080.80
A. T. & S. F.	21,397.38	26,092.53	47,489.91
C. R. I. & P.	23,852.55	28,713.26	52,565.81
K. C. S.	6,729.61	7,966.32	14,695.93
St. L. & H.	6,859.47	13,166.84	20,026.31
M. K. & T.	49,131.28	61,592.13	110,723.41
C. B. & Q.	282,598.70	402,925.83	685,524.53
K. C. C. & S.	8,280.57	11,911.70	20,192.27
C. G. W.	2,338.93	9,526.23	11,865.16

The return to which each company was entitled at six per cent upon the assignable values is:

	Freight	Passenger	Combined
St. L. & S. F.	$130,988.97	$135,857.42	$266,846.39
A. T. & S. F.	23,089.35	17,068.16	40,157.51
C. R. I. & P.	38,911.81	29,599.34	68,511.15
K. C. S.	8,923.38	7,355.76	16,279.14
St. L. & H.	28,694.05	17,179.40	45,873.45
M. K. & T.	75,469.96	67,070.48	142,540.44
C. B. & Q.	409,325.04	417,620.02	826,945.06
K. C. C. & S.	22,564.51	23,892.67	46,457.18
C. G. W.	8,057.70	10,545.32	18,603.02

(f) The court below (Finding 19), found as to the C. B. & Q. the ultimate facts to be:

	Freight	Passenger
State earnings	$1,580,529.64	$1,611,702.92
State expenses	1,324,453.83	1,489,746.71
	$ 256,075.81	$ 121,956.21
Crediting net result of taxes and rentals	2,487.99	2,798.50
	$ 258,763.80	$ 124,754.71
Diminution in earnings	112,533.71	
Net earnings	$ 146,030.09	
Extra cost	484,129.29	158,205.70
Loss	$ 338,099.20	$ 33,450.99
Net 6 per cent return to which company was entitled	$ 409,325.04	$ 417,620.02

The state passenger expense thus found is $1,489,746.71, as against $1,348,034.08, the revenue proportion claimed by (Ex. 98) Mr. Sturgis, and conceded (Rec., 4767-4763) by the state's expert. This change was adopted (Rec., 5315-5317) from the figures (Rec., 201-206) of the joint experts who by consent (Rec., 174) spent days with the court going over all figures and filed a report so giving the figures. The reason for the change was not disclosed. Possibly there was some reduction in the total passenger business, by throwing some items into miscellaneous passenger, thus increasing the percentage of state passenger from about 47.55 (Ex. 98, Rec., 5091) to about 50 per cent. Possibly it was a mistake. Anyhow, the figures must be taken to be correct. It was found by an *agreed* tribunal and the proceedings before it are not preserved. Moreover, the court asked for corrections of any error or mistake, giving thirty days for the purpose (Finding 17, Rec., 5315; Finding 20, Rec., 5327). No suggestion of error was made till the brief was filed here.

But stating the account as to the passenger business upon the division made by Mr. Sturgis (Rec., 4747; Ex. 98, Rec., 5091) and agreed to by the state (Rec., 4767-4773), omitting the figures of the four experts, adopted by the court, this is the result:

Earnings	$1,611,702.92
Expenses deducted	1,348,034.08
Leaves	$ 263,668.84
Crediting net result of taxes and earnings	2,798.50
Leaves	266,467.34
Extra cost deducted	158,205.70
Net earnings	$ 108,261.64
Net 6 per cent return to which company was entitled	417,620.02
Loss	$ 309,358.38

With no extra cost there was a return of less than six per cent upon the assignable value. The gross earnings upon the C., B. & Q. for 1908 were $12,317,122; the expenses were $10,301,534.53, making net returns in the state from all sources $2,015,587.47 (Findings 17, 18, Rec., 5315-5317). 6 per cent return upon the value found (Rec., 5311) $53,172,907.83, was $3,190,374.46. So as a whole the Missouri returns were as to that road, insufficient.

IV.

It is immaterial whether the railroad does or does not make up its losses by charging more or less to other traffic.

(a) It is suggested in the assignments or error, but never yet has been argued here, that the decree was not as to the freight act warranted, because the losses under the act of 1907 could be

made up by charging more upon traffic not affected thereby. Upon this subject Judge Philips (Appendix 8.) said:

> "It is next objected that inasmuch as in determining the question of fact as to whether the maximum rate fixed by the legislature upon a specified article by the carload is oppressive or confiscatory of the property of the railroad company, we must take into consideration the whole earnings of the railroads; the amounts realized on all classes of shipments; so that while it may be true that the maximum rate fixed by the statute for shipping the particular specified articles may be low and independently considered, carriage could not be made without sacrifice or loss to the carrier, yet, in determining whether or not the railroads are to suffer as a result we must take into consideration all the rates established by the schedules approved by the railroad commissioners. In other words, as it seems to us to be the logical sequence of the argument made by counsel for the respondents in this case, that the railroad commissioners, if they should ascertain that the maximum rates established by this act were too low, they might average their schedule by increasing the rates on other articles than those specified in the act of the legislature. In answer to that it occurs to the court that the bills in this case not only aver but that would be implied, that the existing rates specified in the schedules of carriage and which presumptively had the approval of the railroad commissioners are reasonable rates on all articles as heretofore understood, and that by 'reasonable rates' implies such as do not unduly burden the shipper and such as do not unduly increase the income of the railroads. They are reasonable in the meaning of the constitution. The presumption, therefore, it seems to us, is to be indulged on this preliminary hearing, that those rates are to be maintained until changed by order of the railroad commissioners, and if, as the bill charges (and that fact is conceded on this hearing) that they cannot carry the articles specified in the legislative act of 1903 without loss, not only without profit to the railroad companies, but with an absolute loss for carrying it, would not cover the expenses of transportation, all things considered, for the purpose of this bill it is to be assumed that the rates existing on the other articles being reasonable, the presumption is that they will be maintained until it is altered by the railroad companies. I might observe in this connection that while it is true that the courts, in determining the question as to the reasonableness or unreasonableness of these rates prscribed by leg-

islative acts, agree that a great many questions enter into the consideration and determination of that matter, that is the reasonable and unreasonableness, you must take into account what it earns on all articles carried and shipped, and that the result is to be drawn from an aggregation and consideration of all these matters. But the supreme court has never said, and in my humble judgment it never will say, that in order to justify and to validate the particular act of the legislature fixing the maximum rate upon particular articles of merchandise or the subjects of carriage, that they can, in its relation to other subject-matters of shipment minimize the shipment on one article, by exaggerating the amount of charges on schedules on other articles. The underlying policy and inspiration of the inter-state commerce act itself is equity among all patrons of these public carriers. The carrier is prohibited from discriminating. He must be just, alike to all comers, and in determining whether he deals justly and fairly and equitably with all patrons of the road consideration must always be had in the relation of one article shipped to another. For instance, we could not say that because a man wants to ship a carload of cattle from here to St. Louis that the car should be taken from here to St. Louis for a dollar a car, and then say as to a man who wanted to ship a half dozen cows or a half dozen sheep that they might take them for $10. That would be discrimination unquestionably among these shippers, and it cannot be that the law would uphold an Act of the Legislature that would justify discrimination in favor of one shipper as against the amount to be paid by the other, in order to ascertain this equation, in determining whether the railroad can do this business without loss or not."

So Judge McPherson below (Opinion Rec., 5301-5302) said:

"Most of laymen and many lawyers believe that the question is whether the railway company as a system is earning sufficient revenue upon the value of the property of the system. They believe that if the Burlington, Santa Fe, Wabash, or any other railroad system is earning such money as will pay all charges and expenses including taxes and interest, with reasonable dividends to the stockholders, that state rates for state business must stand. Of course no one believes this who has given the slightest attention to the question. That precise question was before, and was decided by Justice Brewer, (64 Fed. Rep., 165), and affirmed by the supreme court in the Nebraska case of *Smyth* v. *Ames*, 169 U. S., 466). The only question is as to Missouri rates, less expenses properly charged against the same. And if this balance does

not leave sufficient to pay a reasonable return, the law is invalid. And if the railroad system of any company is earning more than a reasonable return by reason of interstate rates, which affect the people many times more than local rates, and if such interstate rates are too high, congress either acting alone or through a commission must make the corrections."

In *Central R. Co.* v. *Northampton Co.*, 11 Northampton Co. Ct., 342, it was by Scott, P. J., said:

"Argument was addressed to me intended to establish by arithmetical demonstration that under the new rate the net profits of the company had not been greatly diminished by operation of the act; but if this can be sustained it falls short of meeting the essential fact asserted by proof that from intra-state passenger business (separate from freight, 220, p. 116), when the company reduced the fare to 2½ cents, and afterwards they were less than 6 per cent, on the investment, and that there was a deficit from the passenger traffic alone in Pennsylvania. 'What the company may choose voluntarily to do (sale of mileage books at reduced rates) furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the power to compel them to do. *Nor does it furnish a standard by which to measure the reasonableness of the matter enacted by the legislature.* The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business, which it has the right to change at any moment, furnishes no argument for the existence of a power in the legislature to pass a statute in relation to the same business imposing additional burdens upon the company.' *Lake Shore, Etc. Ry. Co.* v. *Smith*, 173 U. S., 684, 697. * * * Any comparison between the amount of dividends paid by the company in the years 1907 and 1908 is not only unsubstantial but irrelevant, as these are declared upon revenues from both passenger and freight earnings, etc., and embrace those from interstate traffic as well as intra-state. *Smith* v. *Ames*, 169 U. S., 466. * * * The principal contention of the defendant has been to show from these exhibits that there has been no substantial diminution of plaintiff's receipts beyond those of 1907 when the rate was fixed by the Board of Managers at 2½

> cents. It may be so. If however, by reasons of business competition they voluntarily elected to operate the passenger service in this state at a loss while pursuing mainly the chief purpose for which their road was constructed, in the transportation of coal, and for which the provisions of the original lease seem to have been designed, they cannot be compelled to adopt a legislative rate of carriage that produces the same result, and which they may not alter whenever, under changing industrial conditions, they believe it expedient."

In *M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493, 497, 498, Judge Hook thus adverted to the question:

> "It is also urged that the bills of complaint are defective because they do not assail the freight rates separately. But the bills disclose the contrary, at least by express general allegations. Moreover, the rates in question should properly be considered as a body and in connection with the other freight rates of the companies not affected by the orders. Though the orders, save three modifications, were made successively, at different times during the year 1908, the rates prescribed constitute as much a single body as if embraced in one order. They affect from forty to fifty per cent of the local freight business, and cause an average reduction of about forty per cent of the prior rates applied to the same amount of traffic. Presumably the commission preserved a due relation among them so far as is practicable in such cases, and there is no contention that the rates left untouched are relatively as low. When all the local freight earnings are considered an insufficient net return is clearly disclosed, and there is no difficulty in locating the cause."

This view was approved upon appeal (185 Fed. Rep., 321, 328; certiorari denied, 218 U. S., 675, 220 U. S., 618), when Judge Sanborn said:

> "It is the necessary effect of an established body of rates not the forms or terms or times of the orders that establish it, that determines whether or not it is confiscatory. The rates under consideration affected 40 per cent of the intrastate freight business of the companies. The necessary effect

of the orders establishing these rates is the same that a single act or order establishing them all at the same time would have had, and the bills were neither demurrable nor defective because they challenged the entire body of these rates, without any specific allegation that each one of them was confiscatory, by an averment that their unavoidable effect was to take the property of the companies devoted to the public use of transportation in Oklahoma without just compensation."

(b) Here the other rates are subject to the order of the commission (Laws 1903, p. 131, Rec., 5-6; Appendix 1). Whether any order has ever been made in reference thereto or the existing rates merely acquiesced in, leaving them in existence as the approved rates which are not to be changed, is wholly immaterial. Presumably, and for the purposes of these cases, it must be said that the other rates are fair and just and the question is whether an unreasonably low rate may be fixed, so as to make the whole return confiscatory, and then be successfully defended upon the ground that the carrier might charge an unreasonably high rate against some one else, and so make up the loss. The question answers itself.

V.

The validity of the laws under which the rates were to be imposed.

The cross appeal in each case seeks to review the action below in not holding the state laws to be void because:

First. They directly interfered with interstate commerce.

Second. They were confessedly confiscatory as to most of the roads. It is then discrimination to enforce them as against the rest.

Third. The two-cent passenger rate law is unreasonable and discriminatory in exempting from its provisions roads forty-five miles or less in length.

We consider these questions in their order. If right therein the railroad company was entitled to an absolute injunction, even if the rates in question were not confiscatory. These questions probably arise upon the state's appeal. However, as each decree below provides for its suspension in case changes in the future make the rates reasonable, it was as a matter of precaution deemed proper to bring these questions here by the cross appeals. Whether the cross appeals are properly here is not very material, if the questions are considered and decided.

1. THE LAWS DIRECTLY AFFECT INTERSTATE COMMERCE.

(a) If as a matter of fact the laws directly affect interstate commerce they violate the federal constitution, which vests in Congress exclusively, the regulation of interstate commerce. This in the Minnesota case (*Ex parte Young*, 209 U. S., 123), when first here, was said to be "no frivolous question."

In *M. K. & T. R. Co.* v. *Love*, 177 Fed. Rep., 493, 498, Judge Hook said:

> "It is said by counsel for defendants that because of the higher range of local rates in Oklahoma, that state should be credited with a greater percentage of the interstate revenue than the mileage basis yields. That is but another way of asserting that local rates so directly affect interstate rates and the earnings therefrom that their influence may be measured and must be regarded by the courts. If that be true, then in every case every reduction by the state authorities of local rates directly and materially affects a subject-matter the regulation of which is vested in Congress. A similar contention was made in the Young case (209 U. S., 123, 145), and Mr. Justice Peckham, speaking for the court, said: 'The question is not, at any rate, frivolous.'"

Later, in the Minnesota case, (*Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep., 765), the master reported that as a matter of fact, the state rates did affect interstate commerce and that the adoption of the state rate at common border points, made it necessary to either reduce interstate rates or without their reduction maintain the state rates which, under the interstate commerce act, would be discriminating. To properly appreciate this question the master's report and Judge Sanborn's opinion should be read as a whole. So likewise all of the many briefs for and against the proposition. The exhaustive briefs in *L. & N. R. Co.* v. *Siler*, submitted with these cases, fully consider the question in seeking to review an adverse decision below (186 Fed. Rep., 197). So does the admirable brief of Mr. C. W. Bunn in the Minnesota case.

(b) In addition to and supplementing those briefs and making them applicable to these cases it is submitted that the question is wholly one of fact, and will be here considered only to the extent of showing how, upon the facts, the Missouri cases are clearly within the principle. A discussion of the question will be left to the separate brief of Gardiner Lathrop. Missouri, with its rivers on two sides of the state, is peculiarly situated geographically. This fact, with the course of its railway lines, presents this question as pointedly as could be done in any other state. The rivers upon its east and west boundaries are basing points as to all freight rates, state and interstate. Every interstate rate from the east to the west is made up of through rates to and from the rivers together with the local rates across the state. The C. B. & Q. is the short line, with a mileage of 198 miles from Hannibal to St. Joseph. This distance measures the total freight rate between St. Louis and Kansas City, 280 miles, and St. Joseph, over 300 miles. Therefore the enormous business between St. Louis and Missouri river points, state and interstate, must be at the expense of carriage for 280 to 300 miles, and yet under a mileage law be paid only for 198 miles. This the

state's expert expressly conceded (Ev. Taliaferro, Rec., 4585-4586). A situation, less only in degree, exists as to all competitive points. In the passenger business the same principle applies because the short mileage between two points fixes the total mileage for which the two-cent rate must be paid. The number of active progressive interior competitive points in the state, the location of the great cities upon different sides of the two boundaries of the state and the marked differences in the mileage of the roads prevents any company from receiving a full two cents per mile. There are other peculiar conditions in Missouri. The Missouri Pacific and Chicago Great Western between St. Joseph and Kansas City run from Missouri into Kansas and thence back into Missouri. Though the origin and destination is in the state, still this is interstate carriage. (*Hanley* v. *K. C. So. R. Co.*, 187 U. S., 617; 47 L. Ed., 333). The C. B. & Q. and St. J. & G. I. are competing lines between the same points and wholly within the state. A similar situation exists as to the Frisco, Kansas City Southern and M. K. & T., interstate carriers between Kansas City and Joplin district and the Missouri Pacific, a state carrier. In each of these instances, if the competing carrier wholly in the state is compelled to adopt a low state rate, these interstate carriers between the same points must make a like reduction or obtain none of the business. It is no question of any voluntary act of a railroad. It is an all-impelling force which cannot be withstood. So the witnesses say; so the court below found.

The cases of the C. B. & Q. and Missouri Pacific between St. Joseph and St. Louis are illustrative. The two are great trunk lines crossing the state. The distances between the two points are substantially the same. The amount of traffic between the points is enormous. The moment the C. B. & Q., running wholly in the state, puts in a state rate, the Missouri Pacific, which in its interstate course passes out of and back into the state, must put in the same rate or else do none of the business. So the C.

B. & Q. has lines from Atchison and Leavenworth, upon the Kansas side of the Missouri river, running across the state to the cities upon the Mississippi. Just across the border, it has the towns of East Leavenworth and Winthrop. When the state rates are fixed, they must be put in force from St. Joseph, East Leavenworth, Winthrop and Kansas City. Atchison and Leavenworth must have the same rates because they, in location and in matter of distance, are practically on a parity with the cities in Missouri. If the railroad company maintains its interstate rates from Atchison and Leavenworth, there is a clear discrimination if the lower state rates are maintained from St. Joseph, East Leavenworth, Winthrop and Kansas City. So if the low state rate be put in from Kansas City, Missouri, there would be discrimination in keeping in a higher interstate rate from Kansas City, Kansas. The only way to avoid the discrimination is to adopt the same rates for state and interstate business from all these points. Thus it is plain that the state rates do affect the interstate, and the question is precisely the same as was decided by the master and court in the Minnesota case.

The facts and reasons supporting these statements are outlined in the masterly article of Robert Mather, exhibit 4, in the St. L. & S. F. case (Rec., 4806-4820), and the undisputed evidence of C. Haile (Rec., 4035-4076), Geo. H. Crosby (Rec., 555-558, 578-604, 846-847), Darius Miller (id., 605-618), W. C. Stith (Rec., 1543, 1770-1773), A. D. Bethard, (Rec., 4078-4098), Jas. Peabody (Rec., 4411-4413), C. L. Stone (Rec., 4481-4482), and J. W. Kendrick (Rec., 4390-4403). The state's expert practically conceded these facts. (Ev. Taliaferro, Rec., 4584-4586). The railroad maps (Rec., 2365-4897), show the location of the border cities, and the reports of the board of equalization show the points from and to which the lines run. The census reports for 1910 show the populations of the cities in question to be:

(aa) MISSOURI CITIES.

St. Louis	687,029
Kansas City	248,381
St. Joseph	77,403
Joplin	32,073
Hannibal	18,341
Carthage	9,483

(bb) KANSAS CITIES.

Kansas City	82,331
Atchison	16,429
Leavenworth	19,363

(cc) ILLINOIS CITIES.

East St. Louis	58,547
Quincy	36,587

Of necessity the state business between these border towns is enormous and substantial. The loss upon interstate business *caused* by the state rates was very large. (Statement, *supra* Div. 7.)

(c) The court below thus found (Finding 3, Rec., 5306, 5307), the facts:

> "Both from a geographical and railway standpoint Missouri is situated differently from the other states of the Union, there only being two or three other states that have a resemblance to it in these particulars, and each of them in a lesser degree. This is so because the Mississippi is its boundary on the east all the distance. From a railroad standpoint the Missouri river is its boundary line on the west, although physically the Missouri river is only the western boundary line from the northwest corner of the state about half way to the southwest corner. But at the half way point, namely, Kansas City, the river turns directly to the east, and continues its way to the Mississippi river. In its production, business and commerce all that part of Missouri to the north of the Missouri river is practically like the south half of Iowa, the country districts producing large quantities of live

stock and grain for the market as well as much bituminous coal. The south half of Missouri is entirely different. The amount of grain and live stock is much less than in the north half of the state. But the south half has a large amount of timber, stone, lime, lead, zinc, iron and fruits. St. Louis on the east is a city of nearly a million people, Kansas City on the west nearly half as many, while St. Joseph has more than one hundred and twenty-five thousand people. These three cities carry on large manufacturing interests. The grain, live stock and packing house interests at Kansas City and St. Joseph are enormous. For a third of a century or more for reasons which need not be repeated, rates from the East were fixed to the Mississippi river, and later on, from thence to the Missouri river. The interstate rates either in or out were the one plus the other. It was the same from the West. It was likewise the same for the trans-state business going in either direction. Such is the method existing today. This brought about the fact which for years has existed and exists today, that the short line of road between the two rivers fixes the freight rates. To illustrate, the Burlington road is the short line between the rivers, being 198 miles from Hannibal to St. Joseph, and the same distance, within a few miles, to Kansas City. The roads between Kansas City and St. Louis and there are four at least of them, including the Burlington, is an average distance of nearly 300 miles, but some of the roads being fifty miles or more farther between the points than the others. This brings about the fact that all freight rates between any one point on the one river and any point on the other river are the same as the rate from Hannibal to St. Joseph over the Burlington line. That is to say, the freight rates on any road, regardless of distance, are the same between St. Louis and either Kansas City or St. Joseph that they are between Hannibal and St. Joseph over the Burlington line. This has given the three cities of St. Louis, Kansas City, and St. Joseph great advantages over other points. Competent persons say that to change this system will work irreparable harm to the three cities named, as well as to all other places within the state, by driving both the jobbing and manufacturing business to seaboard points. As to this no finding is made nor opinion expressed because it is believed to be a matter of policy upon which this court in these cases should express no opinion. As to the passenger rates, by reason of competition the fare is the same between Kansas City and St. Louis, the shorter line fixing the rates, thereby compelling the longer road to be at much expense without remuneration. This is likewise true as to all competitive

points. As to the foregoing question of rates and fares, there is no United States statute governing the same, and there is no Missouri statute upon the subject except the two statutes questioned by the bills, one dealing with certain commodities per car per distance, and the other fixing the passenger fares at two cents. Aside from these two statutes, and as to any bearing they have as to charges between the two rivers, the conditions named have been brought about and exist today by reason of a long time custom and by reason of transportation, actual and probable, upon the two rivers. Still further bearing on the question are the following facts: Joplin is a city in the southwestern part of the state of more than twenty-five thousand people. There are a number of towns adjacent thereto, giving that county (Jasper) a population of 200,000 people. It is a very large mining district of lead and zinc. Between Kansas City and Joplin three of complainants herein have railroads. The Missouri Pacific at all points between the said places is within the state. Each of the other two between said points is partly without the state, starting within and going out and coming back, thereby making it interstate business as to two of the roads between Kansas City and the Joplin district. Between Kansas City and St. Joseph, four roads do the business. The Missouri Pacific and Chicago Great Western is each part of the distance within the state of Kansas, while the Burlington and St. Joseph & Grand Island Company is each wholly within the state of Missouri between the two cities. Between St. Joseph and St. Louis two of complainants do practically all the business, which is very large in both passenger and freight. These are the Burlington and Missouri Pacific. Between said cities the Burlington line is wholly within the state. But the Missouri Pacific line is partly within the state of Kansas, crossing the Missouri River at Atchison and coming back into the state at Kansas City. On the foregoing facts the finding is that the short line between two competitive points *necessarily fixes the rate, and the Missouri statutory rates under the statutes in question fix the rates between the cities named.* But this is so solely because of the geographical location of cities and railroads, and competition, and long time custom. It is not so either because of a statute or any judicial determination by any of the courts of Missouri."

(d) It will be observed that the learned judge below admitted the facts except that he said nothing as to the feature of dis-

crimination. He concluded as a matter of law that the legislation was good because it did not purport upon its face to apply to interstate rates. He overlooked entirely the view adopted in the Minnesota case, that to maintain the state rate, would create a discrimination which could only be avoided by reducing the interstate rate. He also failed to note that it was not a voluntary action of a railroad in meeting a state rate, but the case was one where it was absolutely *forced* so to do. The learned judge below was clearly wrong in his conclusion. He did, however, distinctly find that the state rates in question *necessarily* fixed the interstate rate. The finding exactly accords with the opinion of the late Robert Mather (Exhibit 4, Rec., 4806-4820), whose views were adopted and proven to be correct by an expert (C. Haile, Rec., 4035-4076) of great experience and reputation. As a matter of fact (Finding 6, Rec., 5308), when the state two cent passenger rate was put in force, all interstate fares were forced to become the same as the state, because passengers would buy tickets to the state line and then purchase additional tickets for the remainder of the journey. It may therefore be said:

First. The making of state rates in Missouri *necessarily and directly* affects interstate rates for that competition *forces* the interstate rates to the same figures. To paraphrase the finding the state rate *necessarily* fixes the interstate.

Second. When there are two lines between the same points, like the C. B. & Q., and Mo. Pac., between St. Louis and St. Joseph the interstate rate *must* be fixed at the same as the state or else the interstate carrier will do no business between the same points.

Third. Where points are practically the same (for instance as Kansas City, Missouri, and Kansas City, Kansas) with nothing but a street or invisible state line intervening, the interstate rate must *necessarily* meet the state; otherwise there would be discrimination between localities.

Any law, no matter what its form, which substantially and directly affects or interferes with interstate commerce, is void. The court will disregard forms or names, and look through both for the substance of things. So here this has been forcibly stated (*Galveston H. & T. R. Co.* v. *Texas,* 210 U. S., 217, 227, 52 L. Ed., 1031, 1037; *Western Union Tel. Co.* v. *Coleman,* 216 U. S., 1, 27, 54 L. Ed., 355, 366; *Pullman Co.* v. *Kansas,* 216 U. S., 56, 62, 54 L. Ed., 378, 384; *International Text Book Co.* v. *Pigg,* 217 U. S., 91, 54 L. Ed., 678). The case of *L. & N. R. Co.* v. *Eubank,* 184 U. S., 27, 47, 46 L. Ed., 416, 424, so nearly decides the question now being considered that Mr. Justice Brewer in his dissent thereto, remarked: "It does not seem to me that much is left of state control over local rates."

The rule has, since the hearing below, been applied to the piping of natural gas (*West* v. *Kansas Natural Gas Co.,* 221 U. S., 229), the issuance of free transportation (*L. & N. R. Co.* v. *Mottley,* 219 U. S., 467; *C. I. & L. R. Co.* v. *U. S.,* 219 U. S., 486), the stoppage of all trains at junctions (*Herndon* v. *C. R. I. & P. R. Co.,* 218 U. S., 135, 54 L. Ed., 970; *Roach* v. *A. T. & S. F. R. Co.,* 218 U. S., 159, 54 L. Ed., 978), state car distribution (*St. L. & S. W. R. Co.* v. *Arkansas,* 217 U. S., 136, 54 L. Ed., 698). The most striking and forceful examples of the rule, every line of each opinion being an argument against the validity of the state rates, is found in the recent opinions of Mr. Chief Justice White (*Northern Pacific R. Co.* v. *Washington,* 222 U. S., . . , 32 Sup. Ct. Rep., 160), Mr. Justice McKenna (*Southern R. Co.* v. *Reid*), and Mr. Justice Van Devanter (*Southern R. Co.* v. *U. S.,* 222, U. S., 20; 32 Sup. Ct. Rep., 2; *Mondou* v. *N. Y. N. H. & H. R. Co.,* 222 U. S. —; 32 Sup. Ct. Rep., 169; 222 U. S. —; 32 Sup. Ct. Rep., 140.)

(e) The facts are undisputed. The state has never yet discussed this question. It will probably do so upon this hearing Its expert admitted the facts (Rec., 4584-4586). The view

adopted in the Minnesota case, is also of striking force and is precisely applicable to this situation. Here the C. B. & Q. has lines crossing Missouri, starting at Leavenworth and Atchison, Kansas. It has stations just across the river in Missouri. It has termini at St. Joseph and Kansas City, where the conditions are exactly the same as at Leavenworth and Atchison and the distances from the Missouri River stations are practically the same. Kansas City, Missouri, with 248,381 people is separated by a business street from Kansas City, Kansas, with 82,331. To adopt a lower state rate from Missouri river points necessarily discriminates. The only way to avoid the discrimination is to take out the interstate rate. The same situation exists at all border cities. So it is at East St. Louis and St. Louis, Quincy and East Quincy, Kansas City, Kansas and Kansas City, Missouri.

One of the leading purposes of the interstate commerce act is "to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions" (*Interstate Com. Co.* v. *B. & O. R. Co.*, 145 U. S., 263; 36 L. Ed., 699; *Interstate Com Com.* v. *C. G. W. R. Co.*, 209 U S., 108; 52 L. Ed., 705). When a regulation is made relative to interstate commerce and a state provision exists in reference thereto, "the state statute must give way" (*Gulf, etc., R. Co.* v. *Hefley*, 158 U. S., 98; 39 L. Ed., 910), for "it is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the state law" (*id.*). When there is a congressional enactment "not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority" (*Northern Securities Co.* v. *U. S.*, 193 U. S., 333, 48 L. Ed., 677).

Here congress has by its interstate commerce act prohibited unjust discriminations in the rendition of like services under similar circumstances and conditions, and the only question is whether there would be such discrimination when the rate was

required by the state law. The act of congress must be so liberally construed as to stamp out all efforts to evade its spirit. This court has spoken in no uncertain terms upon this subject (*New Haven Elec. R. Co.* v. *Interstate Com. Com.*, 200 U. S., 361, 391, 50 L. Ed., 515, 521; *Armour Packing Co.* v. *U. S.*, 209 U. S., 56, 52 L. Ed., 681, 691). To say that the state may compel a railroad to make a discrimination is to destroy the efficacy of the act of congress. There is no reason for saying that congress only meant to forbid discriminations in interstate shipments. It meant to require equality to shippers and localities which could not be evaded by saying that the discrimination was only in state traffic. The result and injury would be the same in any case. In this situation there is the same question as was presented in the Minnesota case emphasized many fold by the large border cities and the geographical situation of Missouri.

(f) This question is one that affects the rights of every railroad in the United States and involves the extent of the powers of the interstate commerce commission. The spirit of the interstate commerce act can never be carried out if state commissioners can fix rates which, in effect, destroy those made for interstate traffic. No greater or more important question was ever brought before a court.

(g) Having thus outlined the question as it is presented by the record, the argument thereof will be left to our associate, Gardiner Lathrop, who will deal with it in a separate brief submitted herewith.

2. THE LAWS ARE VOID IN PART AND HENCE VOID AS A WHOLE.

(a) It was upon this subject by Judge McPherson, (Opinion, Rec., 5294-5295, 168 Fed. Rep., 317) said:

"It is urged that these statutes are void because they are not enforceable as to some of the railway companies within the state, and the claim is, that being void as to some, they are void as to all. It is conceded in argument that as to two roads, the St. Louis & Hannibal, and the Kansas City, Clinton & Springfield, the rates fixed are not compensatory. The state's experts agree to this. Usually statutes fixing rates for railroads to observe, classify the roads according to their earning power, and fix the highest rates for those earning the least. But this was not done, except that railroads of a length not greater than forty-five miles not owned nor leased nor controlled by a trunk line, may charge four cents per mile per passenger. The sole theory upon which rates are adjudged void can only be that the rates are not compensatory, and to so decree, the court must have the complaint of each and every road making the claim. Complainants have recognized this by their counsel in bringing as many independent actions as there are railroads complaining. Whether there are any other railroads within the state than these eighteen complainants, neither the allegations of the pleadings nor the evidence show. Perhaps the court should take judicial notice of whether there are other roads or not. Be this as it may, the court is not advised. I assume there are no other roads within the state than these eighteen."

(b) It is not denied that these laws directly affect a substantial portion of the traffic in the state thus carried upon the five roads running out of and thence back into this state. As to that part of the business they are void. If they had been so written they would have been discriminatory. The state's experts, in writing, (Rec., 196, 207) admitted that the laws were confiscatory, upon any theory which might be adopted, so far as concerns the St. Louis & Hannibal and the Kansas City, Clinton & Springfield companies, two of the smaller roads which do not reach the great commercial centers of the state. The figures, net earnings, regardless of extra cost, show a confiscation as to nearly all of the eighteen roads. As the laws are general and on their face applicable to all companies alike, they must, as held in the employers' liability act (*Illinois Central R. Co.* v. *McKendree*, 203

U. S., 334, 31 L. Ed., 298), and the other cases hereinafter mentioned stand or fall as to all. They cannot be enforced against one company unless enforced against all. If void as to one they are void as to all. That the authorities sustain these propositions plainly appears from a slight review thereof.

(c) If a law had been written that it should not apply to the seventeen roads, it would be discriminatory and invalid under the doctrine of *Cotting* v. *Godard*, 183 U. S., 79, 112; 46 L. Ed., 92, 110, and *Connolly* v. *Union Sewer Pipe Company*, 184 U. S., 540, 562; 46 L. Ed., 679, 691, 692. In the first of these cases Mr. Justice Brewer said:

> "If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

In the latter case Mr. Justice Harlan said:

> "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but

may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further extended argument to establish that position would seem to be unnecessary."

(d) The railroad and state's experts at the court's request and by consent (Rec., 174) jointly prepared a tabulation upon the different theories advanced as to all roads. It (Rec., 196, 302) as to two of the roads, St. L. & H. (Nos. 684-5) and K. C. C. & S. (Nos. 698-9) recites:

"Note: It is apparent from the results above shown that upon neither the revenue nor the ton-mile and passenger-mile theory of expenses, can any adequate return on the investment be earned. Further, the state has no figures to present for lack of passenger-mile and ton-mile. It would, therefore, seem to be unnecessary to continue making figures on the assumption of added costs of operation."

This is a confession that the laws, *general* in their character, cannot apply to these two companies.

(e) It is manifest from the proofs that a substantial portion of the business of some of the roads in the state, becomes interstate by starting in, then passing out, and returning into the state. Hence, in such instances, when as to a competing line the state rate is lowered, the interstate rate must likewise be lowered or the business be lost. This is true as to the Missouri Pacific and Chicago Great Western between St. Joseph and Kansas City and the St. Louis & San Francisco, Kansas City Southern and Missouri, Kansas & Texas between Kansas City and Southwest Missouri. Therefore, at least to the extent of such business, the state rate does directly affect interstate commerce and is therefore void. Yet the law is general in its terms, making no exceptions.

It appears that these laws general in their terms, are confiscatory as to most of the roads, and invalid as to a substantial portion of the business of five roads because directly affecting interstate commerce. The question then is can a general law upon its face applicable to all, yet void as to some, be sustained as to the part? There is no room for discussion upon this subject.

As said (*U. S.* v. *Ju Toy*, 198 U. S., 253, 262, 49 L. Ed., 1040 1044) by Mr. Justice Holmes:

> "An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

In *U. S.* v. *Reese*, 92 U. S., 214, 222, 23 L. Ed., 563, 566, Mr. Chief Justice Waite said:

> "We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then, to be determined is, whether we can inroduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

This case was approved, and the foregoing language quoted in *Trade Mark Cases*, 100 U. S., 82, 98-99; 25 L. Ed., 550, 553, where Mr. Justice Miller added:

> "If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make,

it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, namely: Make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law."

These cases were followed and applied in *Allen* v. *Louisiana*, 103 U. S., 80; 26 L. Ed., 318, and *Baldwin* v. *Franks*, 120 U. S., 678, 685-689, 30 L. Ed., 766, 768-769. They were also followed in *Poindexter* v. *Greenhow*, 114 U. S., 270, 305, 29 L. Ed., 185, 197, where Mr. Justice Matthews said:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these cases are cases where the parts are so distinctly separable that each can stand alone and where the court is able to see and to declare, that the intention of the legislature was that the part pronounced valid should be enforcible even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact. An illustration of this principle is found in *Trade Mark Cases*, 100 U. S., 82 (Bk. 25, L. Ed., 550), where an act of congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the states, was held to be void altogether because it embraced all commerce, including that between citizens of the same state, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress."

There was a thorough review and application of the foregoing cases recently, when the secretary of agriculture made a quarantine order in general language not excepting intra-state transportation. Mr. Justice Day (*Ill. Cent. Ry. Co.* v. *McKendree*, 203 U. S., 514, 529, 51 L. Ed., 298, 304) said:

"The terms of order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. * * * It is urged by the government that it was not the intention of the secretary to make provision for intra-state commerce, as the recital of the order shows an intention to adopt the state line, when the state by its legislature has passed the necessary laws to enforce the same completely and strictly. But the order in terms applies alike to interstate and intra-state commerce. * * * Nor have we the power to so limit the secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears upon the face of the order, the secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single and indivisible."

The subject was again involved in considering the Employer's Liability Act (*Howard* v. *Ill. Cent. R. Co.*, 207 U. S., 463, 500, 52 L. Ed., 297, 310), and Mr. Chief Justice White for a majority of the court, said:

"So far as the face of the statute is concerned, the argument is this: That because the statute says carriers engaged in commerce between the states etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other of such carriers, and that the words 'any employee,' as found in the statute, should be held to means any employee when such employee is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it. * * * Concluding as we do that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the constitution, and non-enforcible."

Within the doctrine of the foregoing authorities, the laws

in question are clearly harsh, unreasonable, unfair and discriminatory. This is particularly true of the two-cent fare law.

(f) The two-cent fare law makes that rate apply only to roads having more than forty-five miles in length. It is clearly discriminatory for this reason (*Cotting* v. *Godard,* 183 U. S., 79, 112, 46 L. Ed., 92, 110; *Gulf C. & S. F. R. R. Co.* v. *Ellis,* 165 U. S., 150-159, 41 L. Ed., 666; *Connelly* v. *Union Sewer Pipe Co.,* 184 U. S., 564, 46 L. Ed., 679, 691, 692). The only basis for the classification is the length of the road. A road of that length, doing a suburban business out of a great city, might earn much more of a return upon the value of its property than one out in the state. The distinction is fanciful and discriminatory. In *Cotting* v. *Godard,* 183 U. S., 79, 103, 109, 112, 46 L. Ed., 92, 106, 107, 109, 110. Mr. Justice Brewer said:

> "Clearly the classification is based solely on the amount of business done, and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this; requiring a railroad company hauling ten tons or over of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad company hauling 100 or more passengers a day to charge only a specified amount per mile for each, leaving those hauling 99 or less to make any charge which would be reasonable for the service; or if we may indulge in the supposition that the legislature has a right to interfere with the freedom of private contracts, one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or forbiding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is

one not based upon the character or value of the services rendered, but simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down. * * * So we have the clear declaration of the Supreme Court of Kansas that legislation by which one individual, or even one set of individuals, is selected from others doing the same business in the same way, and subjected to regulations not cast upon them, is a discrimination forbidden by the constitutional provision which obtains both in the constitution of Kansas and in that of the United States, to the effect that the equal protection of the laws is guaranteed to all. May we not rightfully accept this declaration of law by the highest tribunal of the state by whose legislature the act in question was passed, and, accepting the reasoning of that decision, does it not follow that, if an act which provides certain regulations for corporations employing ten or more laborers, and leaving corporations employing less than that number free from such regulations, is an unjust discrimination and a denial of the equal protection of the laws, an act which imposes regulations upon corporations doing business over a certain amount, and leaving all corporations doing a like business less than that amount free from such regulations, is equally obnoxious to constitutional prohibition? * * * But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only different is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less busi-

ness, then all signfiicance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

VI.

There was the right to continue the litigation previously instituted as against the rates fixed by the acts of 1907.

1. Question as to Pleadings.

It was at the former hearing contended that the amendments and supplements filed after the passage of the acts of 1907 were not the proper subjects of supplemental bills, were not germane to or connected with the original bill and that passenger and freight rates should have been the subject of separate bills. In other words, the claim was that by some technical rules of pleading the long trial below was a fruitless task, although no matter in what form presented the result in the future would not be different. It would be unfortunate if such were the result. When, however, the facts are understood, it will be seen that not only is the state in no position to present the question but the subject-matter was, by its own motion, made and treated as the proper matter of supplement and in any event, the amendment can be treated and sustained as an original bill. The justices who heard the C. B. & Q. case upon its oral argument, by their questions to counsel clearly indicated this to be the bent of their minds.

2. THE STATE IS IN NO POSITION TO RAISE THE QUESTION.

While the original bill was directed against the rates fixed by the act of 1905, yet it (Rec., 11) assailed their validity because:

> "Said rates, considered either separately, as a whole, or in connection with the entire traffic of your orator in said state of Missouri, are unjust, unreasonably low and confiscatory in their nature."

No exception was taken to this averment but it was by answer (Rec., 42) put in issue. This brought into the record an inquiry of all passenger as well as freight rates. The evidence (Rec., 237) at the outset went into the question of all business, freight and passenger. This was necessary in order to divide the expenses common to both, like those arising from station, track and mixed train services and general office expenses. The method of this division clearly appears (Ex. 1, 2, Rec., 4796, 4943). This litigation, in this broad form, was invited by the governor's message (Rec., 2450-2451) approving the bill, to the effect that after the evidence was taken the legislature or commission could "fix such rates as under the law, *announced by the courts*, are right and just to the railroads and to the people." After volumes of evidence had been taken, the governor did not wait for the announcement of the courts, but by general and special messages (Rec., 2449, 2450) urged the legislature, *not to repeal* the act of 1905, but to amend it by changing the live stock rate, adding certain products and modifying the penalty clause. He also transmitted to the legislature (Appendix 9), a letter (*id.*) from the Attorney General to the same effect and which expressly said: "The enactment of a law making these changes in the act of 1905 *would not affect the litigation* now pending * * *." So urged by the governor and attorney general, new freight and passenger rate statutes were passed in

1907, all taking effect upon exactly the same day. The freight rates were slightly increased, but this increase was far more than overcome by the decrease in the passenger rates, and provision was made that the express repeal of all the act of 1905 relating to rates should not (Sec. 1194b) affect any penalty or liability which had accrued under that act. There was thus carried out the suggestion of the attorney general to so frame the new law that "it would not affect the litigation now pending." *The state thus made it necessary to continue the litigation under the old law.* The rates to be charged, however, were necessarily to be determined by the new act. This because the old one had answered its purpose (*Dinsmore* v. *Express Co.*, 183 U. S., 115, 46 L. Ed., 111) and had been displaced by the new. Hence when the state made it necessary to continue the former litigation, the result of which was to be governed by the new law fixing new rates, it was necessary to amend and bring the latter to the attention of the court. These thoughts are emphasized because the legislature attempted to enforce the act solely by criminal penalties, so as to prevent injunction by the federal court. This scheme the then attorney general thus (Appendix 9) boldly and artfully suggested:

> "In addition to the results to be accomplished by further legislation in this direction, *there should be adopted, if practicable, a plan by which a determination of this question can, in the first instance, be kept in the courts of the state of Missouri, and if such a result is possible, it should be accomplished.* While I do not mean to be understood as saying that the federal courts would be unfair to the state, yet I do say that if the state of Missouri is a good enough place for the railroads to do business and to make money in, the courts of Missouri are good enough courts in which to litigate the question of the reasonableness of rate regulation adopted by the legislature of the state. And I am satisfied that at least, a more speedy determination of this question can be had in the state than in the federal courts."

This in and of itself would have given jurisdiction below to an original bill (*Ex parte Young*, 209 U. S., 123, 52 L. Ed., 714).

The new act having been made with the avowed purpose of defeating new litigation in the federal court, made it necessary to have the facts, in some kind of form, called to the attention of the court. After this, the state consented (Finding 6, Rec., 5308; Opinion Rec., 5330) to a temporary injunction as to freight rates. This consent having been given after the new bill had been filed, was a clear recognition of the right to file it. The state obtained (*id.*) an order (Rec., 61) keeping in force the two-cent fare rate, and had the benefit thereof for two years. Finally, the state, in consideration of a ninety day continuance, consented (Rec., 114) to try all of the eighteen cases upon oral evidence and that theretofore taken under the act of 1905, thus making material in an inquiry under the acts of 1907, the evidence taken under the former act. By consent there were entered these two orders (Rec., 115, 174) clearly recognizing the general jurisdiction and control of the court over the new litigation. One substituted the lessor C. B. & Q. R. Co. for its lessee, by providing:

> "This cause came on for hearing this 20th day of June, 1908, upon the *written stipulation* of the parties of date June 19th, 1908, the court being fully advised in the premises and pursuant to the terms of said stipulation orders that the Chicago, Burlington & Quincy Railroad Company, having since filing of the amended and supplemental bill by mutual consent canceled its lease with the Chicago, Burlington & Quincy Railway Company, may be and is hereby substituted as complainant herein, without the necessity of filing a new, amended, or supplemental bill, with the same force and effect as if the original amended and supplemental bills and replications had been filed in its name, the state not waiving, but expressly reserving every objection which could have been made to the jurisdiction had the suit been continued in the name of the railway company, without any termination of the lease."

The other provided:

> "Each of the foregoing causes came on for hearing this January 20, 1909, the parties appeared by counsel, and ad-

mitted that the term of office of Herbert S. Hadley as Attorney General had expired, and Elliott W. Major was the duly qualified and acting successor and Attorney General of Missouri. He appeared in person, and by the consent of himself and all counsel in the cases, it is ordered that without any formal pleadings, Elliott W. Major as Attorney General of Missouri be and he is hereby substituted for and in the stead of Herbert S. Hadley, so that all pleadings against and on behalf of said Hadley shall apply to the substituted party as fully as if made against and for him."

3. AMENDATORY AND SUPPLEMENTARY MATTER CAN IN THE INTEREST OF JUSTICE BE TREATED AS AN ORIGINAL BILL.

The order (Rec., 61) permitting the amendment and supplement then recited:

"Complainants' motion for leave to file an amended and supplemental bill is sustained and such leave is given, the same to be filed as of June 11, 1907. *Upon such filing process shall issue so that if the court hereafter decides that the ends of justice require, and the rules of equity permit, the said bill may be treated as an amended, supplementary, ancillary, dependent or original bill.* To said bill each of the parties named therein shall be and is hereby made a party."

Process was issued (Rec., 73) and presumably served, for appearances were entered (Rec., 74, 75) the same as if service had been obtained. Demurrers were interposed (Rec., 82, 86, 89, 90) and answers (Rec., 95, 103) and replications (Rec., 104, 105) filed, just as would have been done upon original bill, the then attorney general appearing for all of the defendants and making a common defense. The injunction bond (Rec., 20) upon which surety had been waived (Rec., 9) which had been filed under the order (Rec., 19) for the injunction against the rates under the act of 1905, was *by consent* (Rec., 61) to "stand as appli-

able" to the order as to the freight act of 1907, "the same as if it were executed and filed" at that time. In these circumstances it is perfectly proper to treat the new bill as one original in its nature.

Judge McPherson (Rec., 5275, 5276) below said:

> "A lesser question is whether the bills tendered for filing are supplemental bills to those filed in this court in the eighteen cases two years ago and now pending before Mr. Schofield, the master. * * * What is the supplemental bill in equity? And wherein is the importance of defining it? Usually it is where there has been some change in the rights of the parties, which must be carried forward by a supplemental bill. One hundred and more years ago judges who had but little to do except play the role of mental acrobats and seek to refine and distinguish and to display an affected learning, and to discuss most gravely 'the difference betwixt the west and the northwest side of a hair' most elaborately set forth their views, as to original bills and amended bills and supplemental bills, and bills of review, and bills in the nature of bills of review. The result was that a chancery case lasted for many years. More than fifty years ago the supreme court recognized the folly of much of this, and by a code of rules adopted the system of fact pleading and left the old chancery practice in force only when the 94 rules adopted did not meet the situation that might arise, and by rule 57 defined a supplemental bill. But that is not important in my judgment. Whether this proceeding should be by original bill, or by supplemental bill is of small consequence. If by original bill, the railways had the right to file the same without notice, and the right to a restraining order without notice. If by supplemental bill the usual practice is to require notice. And in either case it is discretionary with the judge to allow a restraining order without notice until a hearing can be had on notice as to a temporary injunction. On Tuesday the 11th instant, the complainants gave notice of filing these bills on Friday the 14th instant. On Thursday they asked to file them. Solely out of courtesy to the Attorney General, who was not present, this was refused; but the court on its own motion issued the restraining order, to keep the matter in *statu quo*. At the time fixed for the hearing the matter was again delayed for a day at the request of the Attorney General, he unavoid-

ably being absent. During that delay the bills were filed in the state courts. For this there is no criticism. But I have stated the facts, and the statement of facts shows that these cases, as to the laws of 1907, were pending and had been pending since Tuesday the 11th instant. And these bills must be considered as filed as of that date. And whether defective as original bills is not material, because such defects can be corrected on demurrer or exceptions, or by the complainant before answer as of course. Nor is it material whether filed in the original cases or separately docketed. If separately docketed, they will at once for trial purposes be consolidated with the old cases, pursuant to Section 921 of the Revised Statutes. If the contention of counsel for the state officers be technically correct, it is without substantial merit as to the rights of the parties."

At another time (Rec., 5271, 5272, 5275) he said:

"But I do not deem if of much importance to determine whether the pleadings tendered for filing are supplemental bills, or whether they are original bills. On Tuesday, the 11th inst., the complainants gave notice of filing these bills on Friday the 14th inst. On Thursday, the 13th inst., the railway companies asked leave to file them. Solely out of courtesy to the Attorney General, who was not then present, this was refused, but the court on its own motion issued restraining orders to keep the matter in *statu quo*. At the time fixed, Friday the 14th inst., the matter was again delayed for a day at the request of the Attorney General, he still being absent. And on that day bills were filed in the state courts at Saint Louis and Kansas City, the purpose being as it is said, to bring about the enforcement of this statute in question. And the argument now is, that as these cases were filed in the state courts, on Friday the 14th inst., the day before the arguments were had in this court, that the same subject-matter was pending in the state courts, and that the state courts would take jurisdiction to the exclusion of this court, the cases being there first pending. But the above statement of facts shows that the cases were pending in this court from Tuesday the 11th inst., and that orders were made on Thursday, the 13th inst., the day before the cases were lodged in the state courts. If these matters could not be covered by supplemental, they could be covered by

original bills, and they were presented prior to the institution of the cases in the state courts. It is not material whether these supplemental bills so-called are full and complete as original bills. Defects could be cured upon exceptions or demurrers, or by complainants on their own motion before the filing of an answer. Nor is it material whether these pleadings are filed in the original cases or separately docketed, because if separately docketed, they will at once for trial purposes be consolidated with the old cases pursuant to Section 921 of the Revised Statutes. And whether the contention of counsel for the state officers be technically correct or not, the contention is without substantial merit as to the rights of the parties. These pleadings should be filed and regarded as having been filed on Tuesday, the 11th inst."

A court will freely construe a bill to be original or supplementary as its character warrants. Thus, a bill denominated a bill "in the nature of a bill of revivor and supplement" was treated and disposed of as an original bill, Mr. Justice McLean (*Connelly* v. *Bank*, 8 How., 386, 609, 610, 12 L. Ed., 1209, 1218) saying:

"This bill has been considered by some of the defendant's counsel as a bill of review. But it has neither the form nor the substance of such a bill. Since the ordinances of Lord Bacon, a bill of review can only be brought for 'error in law appearing in the body of the decree or record,' without further examination of matters of fact; or for some new matters of fact discovered, which was not known and could not possibly have been used at the time of the decree. But if this were a bill of review, it would be barred by the analogy it bears to a writ of error, which must be prosecuted within five years from the rendition of the judgment. (*Whiting et al.* v. *Bank of the United States*, 13 Peters, 15.) Nor is this properly denominated a bill of revivor. When, in the progress of a suit in equity, the proceedings are suspended from the want of proper parties, it is necessary to file a bill of revivor. A supplemental bill is filed on leave, and for matter happening after the filing of the bill, and is designed to supply some defect in the structure of the original bill. But this does not appear to be strictly of that character.

> The complainants denominate it a bill 'in the nature of a bill of revivor and supplement.' It must be treated as an original bill, having for its object the prayers specifically set forth."

So a bill entitled "supplemental bill" was construed and held to be original (*Great Western Tel. Co.* v. *Purdy*, 162 U. S., 329 335, 40 L. Ed., 986, 990), Mr. Justice Gray saying:

> "The subsequent proceeding, begun September 19, 1874, alleging mismanagement and fraud of the new officers and the insolvency of the company, was by other stockholders, and although entitled a 'supplemental bill,' and permitted by the court to be filed in the former cause, was a distinct proceeding, in which Purdy had and took no interest."

In *Schenck* v. *Peay*, Woolw., 175, 21 Fed. Cas., 667, 669, No. 12450, Mr. Justice Miller said:

> "And in determining whether a bill is original and independent, or is ancillary and auxiliary to a matter already before the court, we are not confined to the line which, in chancery pleadings divides original bills from cross-bills and supplemental bills, but may look to the essence of the matter, and to principles which, as regards parties, the federal courts have adopted in reference to their jurisdiction."

In *Ross* v. *Ft. Wayne*, 58 Fed. Rep., 404, 406, a bill was entitled "supplemental and amended bill of complaint," and Judge Baker said:

> "The bill filed by Ross contains all the material averments of an original bill, with the statement of supplemental matter showing the transfer of the rights in question subsequent to the institution of the suit. It is in the fullest sense an original bill in the nature of a supplemental bill; nor is this conclusion varied by the fact that the pleader has

denominated it a 'supplemental and amended bill.' Its character must be determined by its frame and by the nature of its averments, and not from the name by which the pleader has designated it."

In *Vigneron* v. *Auto Time Saver Repair Kit Co.*, 171 Fed. Rep., 580, 581, Judge Lowell said:

"His amended bill before the court contains all the substantial allegations required both of an original bill in the nature of a supplemental bill, and of a supplemental bill proper, although it is entitled as the former exclusively. If the complainant will execute a stipulation (as his counsel offered in open court) to admit under the new bill the proofs taken under the old one, I do not see in what respect the defendant will suffer by the overruling of its demurrer, whatever the amended bill should technically be entitled."

In *MacIntosh* v. *Flint & P. M. R. Co. et al.*, 34 Fed. Rep., 582, at 614, Mr. Justice Jackson, when circuit judge, permitted an original bill to stand as a supplement, saying:

"The court will now order it to stand, and to be treated as a supplemental bill in the original suit, as may be done under the authorities. Story, Eq. Pl., Secs. 882-905; *Neale* v. *Neale*, 9 Wall., 1; and *Graffam* v. *Burgess*, 117 U. S. 195, 6 Sup. Ct. Rep., 686."

In *Neale* v. *Neale*, 9 Wall, 1, 19 L. Ed., 590, 591, 592, Mr. Justice Davis said:

"It is insisted that this proceeding was erroneous; that after a cause has been heard the power of allowing amendments ceases, or if it exists at all, it cannot go so far as to authorize a plaintiff to change the framework of his bill, and make an entirely new case, although on the same subject-matter, as, it is contended, was done in this instance under the leave to amend. This doctrine would deny to a court of

equity the power to grant amendments after the cause was heard and before decree was passed, no matter how manifest it was that the purposes of substantial justice required it, and would, if sanctioned, frequently embarrass the court in its efforts to adjust the proper mode and measure of relief. To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case, but this power would very often be ineffectual for the purpose, unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms, that the party not in fault would have no reasonable ground to object to. That the court has this power and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authorities, Mitf. Ch. Pl., pp. 326, 331; Story Eq. Pl., secs. 904 and 905; Dan. Ch. Pr. & Pl. pp. 463, 466; *Smith* v. *Babcock*, 3 Sumn., 583; *McArtee* v. *Engart*, 13 Ill., 242. Necessarily, in a federal tribunal the matter of amendment at this stage of the progress of a cause rests in the sound discretion of the court. At an earlier stage, this discretion is controlled by the rules of equity practice adopted by this court, but not so upon the hearing, for there is no rule on the subject of amendments applicable to a cause which has advanced to this point. As, therefore, the leave to amend in this instance was within the discretion of the court, we will proceed to dispose of the case on its merits. It is unnecessary, in the view we have taken of the power of the court over amendments at the hearing, to discuss the question whether the amended bill is materially different from the original bill. It is enough to know, if different, that the subject-matter of both bills is the same, and that the contract, consideration, promise, and acts of part performance, stated in the amended bill, are stated with sufficient precision and, if supported by proof, entitle the complainants to the relief which they seek at the hands of a court of equity."

It is hardly conceivable that in view of the action of the state officers, the conduct of the case and consent orders made, the bill would not be treated as an original one, even if technically it were not proper as one of supplement, though it can be sustained as the latter.

4. THE BILL WAS, HOWEVER, PROPERLY SUPPLEMENTARY.

Upon this subject, Judge McPherson (Rec., 5271, 155 Fed. Rep., 220, 221, 222) said:

"A question connected with that is whether the bills tendered are supplemental bills to those filed in the 18 cases two years ago to enjoin the enforcement of the freight tariff law of 1905 now pending before the master. A supplemental bill usually is where there has been some change in the rights or status of the parties which must be carried forward by a supplemental bill, and usually, when a supplemental bill is thus allowed, matters can be brought in which could have been covered by an amendment to the original bill. These discussions as to supplemental bills, as well as to other bills, are exceedingly technical. It seems to me that the test is, not so much in the way a pleading is styled, as what the allegations of the pleadings are. Formerly, discussions as to various bills in equity gave rise to great delay; the results being that years and years would elapse before a chancery case could be concluded. Looking back at those old discussions, it now seems to have been a folly to thus waste the time and energies of the judges and of counsel in determining such technical questions. Such must have been the belief of the supreme court when a code of rules in equity was established; the purpose no doubt being to get rid of the old technicalities which served no useful purpose. By the adoption of the rules in equity, we have a system of fact pleading, covering almost every phase of equity pleading and practice; and it is only when some question of practice is not covered by the rules that we go back to see what the practice of the High Court of Chancery in England was, and then not as positive rules, but as furnishing just analogies. Rule 90 thus providing was adopted in the year 1842, and the supreme court has decided that, when we go to the English Chancery practice, we must take the practice as it existed in England in 1842 when this rule was adopted. By rule 57 it will be seen that the supplemental bill is allowed when any material event has happened after the filing of the original bill. In 1905, the Legislature of Missouri enacted a maximum freight tariff statute as to several commodities. The railways contested the validiy of that statute in the 18 actions above referred to, and these actions are still pending. By the act of 1907 the Legislature declared that all railways should charge but two cents per mile per passenger.

It seems to me that this is an event happening since the institution of the original suits, and an event that is germane to the original controverted questions."

In Story on Equity Pleading (10th Ed.), Sec. 336, it is said:

"In the next place, when new events or new matters have occurred since the filing of the bill, a supplemental bill is, in many cases, the proper mode of bringing them before the court; for, generally, such facts cannot be introduced by way of amendment to the bill. (a) But, here, we are to understand, that such new events, or new matters, do not change the rights or interests of the parties before the court (for then, properly speaking, the bill is not simply a supplemental bill), but they merely refer to and support the rights and interests already in the bill. A supplemental bill may also be brought, not only to insist upon the relief already prayed for in the original bill, but upon other relief different from that which was prayed for by the original bill, where facts which have since occurred may require it."

So at section 345:

"Secondly, an original bill in the nature of a supplemental bill. This division is founded rather upon formal technical principles, than upon any substantial difference from a supplemental bill, properly so called. Indeed, in the books they are usually confounded together. The most prominent distinction between them, however, seems to be, that a supplemental bill is properly applicable to those cases only, where the same parties, or the same interests, remain before the court; whereas, an original bill in the nature of a supplemental bill is properly applicable, when new parties, with new interests, arising from events since the institution of the suit, are brought before the court."

Again at Section 346:

"Thus, for example, when any event happens, subsequent to the time of filing an original bill, which gives a new inter-

> est in the matter in dispute to any person not a party to the bill, such as the birth of a tenant in tail; or which gives a new inerest to a party upon the happening of some other contingency; the defect may be supplied by a bill, which is usually called a supplemental bill, and is in fact merely so with respect to the rest of the suit, although with respect to its immediate object, and against any new party, it has in some degree the effect of an original bill. If any event happens, which occasions any alteration in the interest of any of the parties to a suit, and does not deprive a plaintiff suing in his own right, of his whole interest in the subject, as in the case of a mortgage or other partial change of interest; or if a plaintiff, suing in his own right, is entirely deprived of his interest, but he is not the sole plaintiff; the defect arising from either event may be supplied by a bill of the same kind, which is likewise commonly termed, and is in some respects, a supplemental bill merely, although in other respects, and especially against any new party, it has also in some degree the effect of an original bill. In all these cases, the parties to the suit are able to proceed in it to a certain extent, although from the defect arising from the event, subsequent to the filing of the original bill, the proceedings are not sufficient to attain their full object. The bill here spoken of is properly called an original bill, in the nature of a supplemental bill; because it is original, as to the new parties and new interest; and it is in some sort supplemental also, as being an appendage to the former bill as to the old parties and the old interests."

A mere recital of the facts brings the case within these principles.

5. The Bill was not Multifarious.

This question was disposed of below (Rec., 5278; 155 Fed. Rep., 220) adversely to the state officers.

It is impossible to consider any fixed expense or charge of a railroad without charging a portion thereof to passenger and a portion to freight service. This is particularly true of the roadbed, bridges, terminals and the like. Hence, there is a common

bond of union which destroys the contention. Upon this question the decision in the Minnesota case (*Perkins* v. *Nor. Pac. R. Co.*, 155 Fed. Rep., 445, 447, 448,) is precisely in point. The character of the bills there was thus stated by Judge Lochren:

> "These suits have been brought by one or more stockholders of each of nine railroad companies doing business within the state of Minnesota, and each of them also engaged in interstate business, claiming that the rates fixed by the Railroad and Warehouse Commission, and which have been termed by counsel the "Merchandise Rates," as well as the rates fixed by the legislature of the state by the act of April 4th, of the present year (called the "Passenger Rate Law"), and the rates also fixed by the legislature by the act of April 18th, of the present year (chapter 232 of the statutes of this year, Laws 1907, p. 313), are so low as to not afford adequate compensation to the railroad companies for the services that they are required to perform and a reasonable return upon the property which is invested by these railroad companies, and used in the business, and therefore are confiscatory under the provisions of the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law, or deny equality under the laws; that the requiring of the railroad companies to do business at these rates would not afford adequate compensation, and are equivalent to taking their property without due process of law. These bills of complaint are met by demurrers upon various grounds."

Upon the subject he said:

> "Another ground is that the bills are multifarious, in joining the Warehouse and Railroad Commission and the attorney general, because the acts complained of are separate and distinct acts and the acts of different bodies. The order of the Railroad and Warehouse Commission, of September 6th, of last year, was promulgated by that commiession under the authority of a legislative act, and, as has been decided in many cases, such an order has the same effect as a legislative act; that is, that the legislature has a right to empower administrative bodies to act in respect to this matter of rates and other matters of regulation concerning public corporations engaged in the business of transportation, so that its order has

the same effect as a legislative act. And the other acts complained of are acts passed by the legislature. They all amount to legislation that has been put forth by the state, and it seems to me that complaints against all these acts may properly be joined in one action, and that the Railroad and Warehouse Commission have such charge in respect to the enforcement of these rates that they can properly be made defendants in an action of this kind, as well as the attorney general."

Sir John Leach, in *Salvidge* v. *Hyde*, 5 Mad., 138, quoted in Daniels Ch. & Pr., 336, said:

"In order to determine whether a suit is multifarious, or in other words contains distinct matters, the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the court in order that the suit may conclude the whole subject."

In *Hayden* v. *Thompson*, 71 Fed. Rep., 60, 67, Judge Sanborn said:

"While it may be difficult or perhaps impossible to draw the definite line of demarcation between bills that are and are not multifarious, it may be safely asserted that no bill is multifarious, which presents a common point of litigation, the decision of which will affect the whole subject-matter and will settle the rights of all the parties to the suit."

In *Brown* v. *Safe Deposit Co.*, 128 U. S., 403, 412; 32 L. Ed., 468, 470, the court said:

"It is not indispensable that all the parties should have an interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matter in the suit that they are connected with the others."

Grant v. *Phoenix L. Ins. Co.*, 121 U. S., 105, 30 L. Ed., 905, 908, involved a bill seeking to foreclose an equity under twenty-six trust deeds executed to five different sets of trustees. One deed only covered all the property. The complaintant was beneficiary under all the deeds. All the trustees and certain purchasers of lots and certain holders of liens against various lots were made defendants. The court said:

> "Nor is the bill open to the objection that it is multifarious. The fact that one of the deeds of trust covers the entire property, and that some of the creditors of Grant who were made defendants have liens upon various portions of that property makes it eminently proper and indeed indispensable, if a clear title is to be given by a sale, to adjudicate all the claims in one suit."

In *Nelson* v. *Hill*, 5 How., 127, 12 L. Ed., 81, suit was brought by two sets of creditors against representatives of deceased partners of two firms and the surviving partner of one of the firms. One of the decedents had been a member of both firms. Held: The bill was not exceptionable for multifariousness.

U. S. v. *Flournoy Live Stock Co., et al.*, 69 Fed., 886, was a suit by the United States as trustee for Indians to whom lands had been allotted in severalty seeking to oust persons occupying under void leases. The defendants claimed under separate leases from different lessors. The court held: That although the defendants have no common interest in the suit, since the United States have one of common interest touching the matter of the bill, arising out of the trust relation existing between them and the Indians, the bill was not multifarious.

Way v. *Bragaw*, 16 N. J. Eq., 213. The bill charged that B., a judgment debtor, had fraudulently conveyed real estate to H., and personal property to W. The prayer was that the conveyance to H. and the transfer to W. be declared void, and that the prop-

erty of B. be applied in payment of complainant's judgment. The court said:

> "Where there is one entire case stated as against the debtor it is no objection that one or more of the defendants, to whom parts of the property have been fraudulently conveyed, had nothing to do with other fraudulent transactions. The case against the debtor is so entire that it cannot be prosecuted in several suits and yet each of the defendants is a necessary party to some part of the case stated. In such case neither of the defendants can demur for multifariousness or for misjoinder of causes of action in some of which he has no interest."

In Story Equity Pleadings, 10th Ed., 285-286, this is treated as a well-recognized exception to the general doctrine respecting multifariousness. The rule was thus stated by Chancellor Walworth, in *Boyd* v. *Hoyt*, 5 Paige, 78:

> "Where the object of a suit is single, but different persons have or claim separate interests in distinct or independent questions, all connected with and arising out of the single object of the suit, the complainant may bring such different persons before the court as defendants; so that the whole object of the bill may be obtained in one suit, and to prevent further unnecessary and useless litigation."

In Foster Fed., Pr. 75, it is said:

> "Multifariousness depends so much upon the discretion of the courts of first instance that a decision overruling an objection upon that ground would not be reviewed upon appeal except under very extraordinary circumstances. When an objection for multifariousness is sustained the complainant will always be allowed, if he asks leave to do so, to amend upon payment of costs. In general, it may be remarked that multifariousness is an objection much more often taken than sustained."

See also *Virginia* v. *West Virginia*, 206 U. S., 290, 51 L. Ed., 1068.

There was in the suits a single object. Each bill alleged that the observance of certain acts of the legislature would result in reducing largely the revenue of the company from its business. These acts are of the same nature, part relating to freight rates, part to passenger fares. The same questions of law and of fact arise, i. e., whether the rates prescribed are confiscatory? As against the company it would be wholly improper to file separate bills upon each act. In case of a beneficiary complaining of fraudulent dissipation of trust funds by a trustee, as well might it be said that a separate suit would be necessary upon each fraudulent act. As declared by the cases cited, an objection will not lie to a bill on the ground of multifariousness merely because some of the defendants are not interested in all the matters in the bill. The railway company is interested in them all and the defendants are each interested in all. Had separate bills been filed upon each act involved, the court would have granted a motion (Sec. 921, Rev. Stat.,) to consolidate the suits, for the reason that they would have been "of a like nature or relative to the same question." To have refused would have involved the court in the necessity of taking substantially the same testimony in different suits, each having the same parties complainant and defendant. Upon the former argument here the state practically abandoned this point. No more thereon need now be said.

VII.

Right to enjoin state officers if the rates were confiscatory.

(a) The then Attorney General induced the legislature to follow his suggestion of defeating jurisdiction below by passing an act limiting the enforcement of the rates adopted to criminal process.

But there is no longer any question that injunction will lie (*Smyth* v. *Ames,* 169 U. S., 466, 42 L. Ed., 819; *Ex parte* Young, 209 U. S., 123, 52 L. Ed., 714; *Hunter* v. *Wood,* 209 U. S., 205, 52 L. Ed., 747; *Prentiss* v. *Atlantic Coast Line,* 211 U. S., 210, 53 L. Ed., 150; *Wilcox* v. *Consolidated Gas Co.,* 212 U. S., 19; 53 L. Ed., 382). This conclusion was reached below in elaborate opinions (Rec., 5279-5285, 5286-5304, 161 Fed. Rep. 419, 168 Fed. Rep., 317). It has been the subject-matter of a recent elaborate discussion by Judge Hook (*A. T. & S. F. R. Co.* v. *Love,* 174 Fed. Rep., 59; *M. K. & T. R. Co.* v. *Love,* 177 Fed. Rep., 493), whose opinion was affirmed upon appeal (185 Fed. Rep., 321) and certiorari here denied (218 U. S., 675, 220 U. S., 618). It was also recently considered in the Minnesota (*Shepard* v. *Nor. Pac. R. Co.,* 184 Fed. Rep., 765) and Arkansas (*In re Arkansas Rates,* 187 Fed. Rep., 290) cases. There, the authorities were reviewed and the present state of the law accurately summarized.

(b) When the litigation began the state officers suggested that the bill assailing the rates under the act of 1905 was premature. Judge Philips (Appendix 8) thus fully answered the contention:

> "The first objection that is made to the bills is that the actions are premature. That until the railroad commissioners take some affirmative action in the way of establishing a schedule of rates under the provisions of the general statutes applying not only to the classified objects or subjects mentioned in the Act of the Legislature, but also as to other schedules not included in the carload rates fixed by the act. That it is impossible to determine even apparently in the first instance, whether the maximum rates fixed on these articles is excessive or not, and that until that is done, there is no probability or small possibility of any affirmative action being taken by those in authority or in position to claim against the offending carriers. With respect to that it seems to be sufficient to say that by the provisions of the existing statute,

particularly Section 1136 of the General Statutes of Missouri, it makes it the duty of the carrier at once, and makes the carrier amenable to the rate of 1905, because he is a party to the proposed schedule, which will not exceed the maximum rate fixed by law or which may hereafter be fixed. The Railroad Commissioners have no function to perform, or rather no power, so far as they are concerned, to fix a rate that is in excess of the maximum rate, because that is fixed by law—by statute—and the carrier at once becomes amenable to the penalty prescribed for violating this statute, and at once becomes amenable to action by the railroad commissioners, or by the state officers to proceed against them in the event they should exact for carriage of any of the prescribed acticles a greater rate than that fixed as the maximum. So that, without any action at all, the moment that the carrier should demand or receive from the shipper a higher rate than the maximum prescribed in this statute, it becomes amenable to the law, and it certainly is the right of the carrier to have the question determined as a matter of law as to whether he is amenable to that statue or not. It seems to me that he ought to be permitted to take that action to test the validity of that rate established by law as much so as if it had been established by affirmative order of the railroad commissioners, the right to complain of it because it interferes daily and hourly with the shipments that he may propose to make over and above that maximum rate, that is, independent of any action that the railroad commissioners may take in the matter of establishing a schedule of rates for the railroad companies."

Section 1136, (Rev. Sts. Mo. 1899) thus referred to by Judge Philips, is attached hereto as Appendix 7a. When it is read in the light of the opinion, it renders the latter unanswerable. The same observations would apply to the freight acts of 1907. These thoughts are emphasized by the fact that each temporary injunction was as to the rates fixed by the latter, granted by consent, so no such question can arise. But this question was not seriously presented before, and it is to be assumed that it will not be now.

VIII.

As to the claim that the railroad commissioners have duties to perform as to the passenger rates and were improperly enjoined from enforcing same.

(a) One question suggested in the twelfth assignment of errors (Rec., 3380-3382) is that there should have been no finding against the railroad commissioners as to the passenger rates. No harm could come to them from such injunction, nor would there have been any practical difficulty in relieving them from that injunctive relief, just as was done below as to passengers, thus leaving them bound only by the decision, the decree only to be enforced against them, if they hereafter assert the right to enforce the rate. If they will accept this amendment of the decree, without costs, it will be acceded to rather than to take the time of counsel to discuss, or of the court to consider the question. If they will not so consent, the injunction ought to stand for the reasons to be here given. This question was not seriously presented at the former argument.

(b) No question of this kind was ever suggested below till presented after the term by the twelfth assignment of error. The court asked (Findings 17, 20, Rec., 5316, 5327) in vain for suggestions from counsel as to any error or inaccuracy upon its part. The same answers were filed to the bills (Rec., 95, 102, 106) for all the defendants who all claimed that all the rates were confiscatory. No point was made that the railroad commissioners had duties to perform as to one act but not as to another. The new bill (Rec., 71) averred:

"Each of the special duties devolving upon the members of the Board of Railroad Commissioners and the At-

torney General, as stated in the original bill, applies to the acts of 1907 and passenger act aforesaid, so that even as an original bill, this proceeding could be maintained."

The answer of the Attorney General (Rec., 97) as to this averment was:

"This defendant says that it is not true that the special duties devolving upon the members of the Board of Railroad Commissioners and the Attorney General, *as stated in the original bill*, apply to the acts of 1907, and the passenger act aforesaid."

This was a mere negative pregnant which is equivalent to a legal admission. In 1 Encyclopaedia of Pleading and Practice, 796, it is said:

"A negative pregnant is that form of a denial which implies an affirmative. * * * The general rule is that if the denial is a negative pregnant it amounts to no denial at all, and the allegations of the complaint are treated as admitted. * * * If several material facts are stated conjunctively in a complaint, an answer which undertakes to deny these averments as a whole, as conjunctively stated, is evasive, and is an admission of the averments thus attempted to be denied."

The answer denied only that *all* the duties, as stated, apply to all parties and all acts. This is pregnant with admissions. The commissioners simply adopted (Rec., 103, 104) the answer of the Attorney General. Fair play demanded that if they were asking for any limitation of duties to be by them performed they should have made an averment on the subject.

(c) The assignment of errors (Rec., 5257, 5264) are joint and not several and the Attorney General is not interested in this

question. "A joint assignment of errors with specifications against a single defendant presents no question." (*Lake* v. *Lake*, 99 Ind., 339): "If it cannot be sustained as to all, it must be overruled as to all" (*Gordon* v. *Little*, 41 Neb., 250, 59 N. W., 783). In Elliott on Appellate Procedure, 318, it is said:

> "Where several parties unite in one assignment of error, they will encounter defeat unless the assignment is good as to all. If the errors affect the parties severally, and not jointly, the proper practice is for each party to assign errors, for the rule is well settled that a joint assignment will not permit one of several parties to avail himself of errors alleged upon rulings which affect him alone, and not those with whom he unites in the assignment."

(d) It is, however, not necessary to reply upon the foregoing suggestions because the statutes of the state, when considered as a whole, necessarily imply that the commissioners have specific duties to perform. An act of 1907 (Laws Mo., 1907, 386-387), gives almost plenary powers to the commission, sections 1 and 4 thereof providing:

> "Section 1. All orders of the board of railroad and warehouse commissioners, when made in accordance with the powers conferred upon them by the laws of this state, shall be in force and effect until overruled or modified on a final hearing by a court of competent jurisdiction. Such orders, shall likewise be in effect pending an appeal of any case from the lower courts to the higher courts, unless a supersedeas bond be given, as hereinafter provided.
>
> Section 4. Any corporation, co-partnership or individual, or association of individuals refusing to comply with the orders of said commissioners, made in accordance with the provisions of law, shall be subject to a penalty of not exceeding five hundred dollars for each day that he or it so fails or refuses to comply with such orders. Such penalties may be recovered in a civil proceeding to be instituted in any court of competent jurisdiction in the name of the state of Missouri, at the relation and to the use of said commission-

ers. Said proceedings to be instituted by the attorney general or prosecuting attorney of the county in which the violation takes place, at the request of said commissioners, or may be instituted by special counsel to be selected by the commissioners, and such special counsel shall receive as his compensation for such service such per cent of the amount collected as shall be fixed by the court trying the same, not to exceed twenty-five per cent thereof."

The passenger act of 1907 (Appendix 7, Laws Mo., 1907, pp. 170-171) is by its terms made part of Article 4, Chapter 12, of the Revised Statutes of Missouri, 1899, and provides, "that the rates for transportation herein prescribed may be reduced *as hereinafter provided.*" The provision in this respect is similar to that of the old law (Rev. Stat. Mo., 1899, Sec. 1192) and evidently referred to Section 1194a (Laws 1903, p. 132, Appendix 1) the part of the same article which defined the steps to be taken by the commissioners to reduce not only freight rates but any charges.

(e) Sections 12 and 14 of article XII of the state constitution evidently contemplate a uniform system of laws dealing with passengers and freights, thus demonstrating the correctness of the view below expressed upon the application for a temporary injunction (Rec., 5278; *St. L. & S. F. R. Co.* v. *Hadley*, 155 Fed. Rep., 220, 224) in these words:

> "I do not stop to review the various Missouri statutes upon the subject of both passengers and freight, all of which must be considered in *pari materia.*"

In view of the fact that this question was not seriously considered upon the former argument, it is unnecessary now to go into the subject as was done in the former brief.

IX.

Costs were improperly taxed against the railroad company.

(a) The court below (Opinion, Rec., 5304) said:

> "Each party will pay the costs by such party made, except the compensation of the master and stenographer. The half of those will be paid by complainants, and the other half by respondents."

The original decree (Rec., 5243) provided:

> "The taxable costs of the case including those covered by orders of the court, heretofore made or hereafter made on motion to tax or re-tax, including printing bill of Buxton-Skinner Stationery Company, shall be paid as follows, to-wit: The one-half by complainant and the other half by defendants to be recovered by execution to be issued by the clerk of this court upon application of any party in interest."

A motion was filed (Rec., 5244-5245) by the railroads to change the decree in this respect, asking the court:

> "3. To strike from paragraph 11 of the opinion these words: 'Each party will pay the costs by such party made, except the compensation of the master and stenographer. The half of those will be paid by complainants, and the other half by respondents.' This, for the reason that it is contrary to the rules and principles of law and equity and good conscience.
>
> 4. To modify the decree so far as it taxes any costs against complainant, and to re-tax the same, for that there is no reason in equity or good conscience to tax same against it."

In an amended motion (Rec., 5245-5246) this ground of complaint was thus amplified:

"To set aside the provision of said decree as to costs, for that the attempt in the decree to cure the error already rendered in taxing the costs is erroneous. In the original opinion the decision was that each party should pay the costs by such party made, except the compensation of the master and stenographer, half of which should be paid by complainants and the other half by defendants. In open court it was announced that such rule was adopted solely because the defendants were state officers and the state might not appropriate the amount necessary to meet these costs. The supreme court has twice decided this is no excuse and no justification for taxing the cost against the other party. It was conceded by both parties that those shippers who adopted the defense of the state officers and were defended by them ought not to be compelled to pay any additional costs. This concession was agreed to by the court; yet, in the decree as now entered, this concession of both sides and the court, is absolutely ignored. The only change made as to the costs is that one-half of all the costs shall be paid by each party. There is no legal excuse or justification to tax any of these costs to complainants; ample money has already been appropriated to the state officers for the purpose of paying the same, and even if it had not been so appropriated, this would have been no reason for making an order that complainant should pay costs."

The same thing was done and the same course pursued in each of the other cases. (Nos. 672, 673, pp. 207, 208, 209, 272; Nos. 674, 675, pp. 209, 210, 211, 274; Nos. 676, 677, pp. 196, 197, 198, 257, 258; Nos. 678, 679, pp. 207, 208, 209, 271; Nos. 680, 681, pp. 206, 207, 208, 271; Nos. 682, 683, pp. 198, 199, 200, 263; Nos. 684, 685, pp. 194, 195, 196, 255; Nos. 686, 687, pp. 232, 233, 234, 298; Nos. 688, 689, pp. 223, 224, 225, 287; Nos. 690, 691, pp. 244, 245, 246, 304; Nos. 692, 693, pp. 203, 204, 205, 271; Nos. 694, 695, pp. 199, 200, 201, 264; Nos. 696, 697, pp. 194, 195, 260; Nos. 698, 699, pp. 193, 194, 195, 256; Nos. 700, 701, pp. 200, 201, 202, 271; Nos. 702, 703, pp. 190, 191, 192, 254; Nos. 704, 705, pp. 198, 199, 200, 259.)

The court below (Supplemental Opinion, Rec., 5327, 5328) thus disposed of these motions:

"These cases are pending on a motion to modify the decrees and opinion filed March 8th, 1909.

1. The costs were taxed, the one-half to the railway companies, and the one-half to the state officers. The company being successful, it is contended that the taxable costs aggregating about eighteen thousand dollars should all be adjudged against the state officers. In actions at law, in the absence of a tender or statutory offer to confess judgment, the costs follow the judgment. In equity cases such is the general rule, but not the invariable one. The award as to costs is discretionary. Two things influenced the court in dividing the costs herein.

First. Defendants are officials, and as officials are representatives. They have no personal interest in the litigation. This of itself is not enough to avoid the costs, but it is to be considered. It will be presumed that the legislature will appropriate a sufficient amount to protect these officers. But this is not always done. The last legislature appropriated $40,000.00 for these cases, which was but two-thirds enough for the two years. The Master in Chancery and the lady stenographer gave a great deal of time, followed by very large, but justly owing bills, the one-half of which has been paid by the railways, and by the state nothing with the appropriation exhausted. Whether the other half is paid all depends upon what the legislature does.

Second. The more sufficient reason for dividing the costs is because of the extravagantly enormous record made in the cases. The Master gave many weeks to taking evidence, and many more weeks were given by the court in taking evidence. Both the master and the court were powerless to abbreviate the record, because the supreme court in the case of *Blease* v. *Garlington*, 92 U. S., 1, and the circuit court of appeals for this circuit, in case of *Shubert* v. *Woodward*, 167 Fed. Rep., 47, 52, have held that trial courts must receive in equity cases all evidence offered that is germane to the issues. I complained, and in effect gave warning many times to the parties, but without avail, because of the prolixity of the record. Something like 15,000 pages of evidence were taken, when one-third would have been as strong a presentation of either side. Courts should impose penalties for this, and the only penalty is by way of costs.

> Both sides were at fault, and both sides should bear the burden. It does not follow that such a precedent will be one of plague. It is not a precedent to be followed except in cases where it ought to be followed."

The cross appeals seek to review the action below in this respect. (Rec., 5334-6; Nos. 672, 673, pp. 230-4; Nos. 674, 675, pp. 232-6; Nos. 676, 677, pp. 215-19; Nos. 678, 679, pp. 229-233; Nos. 680, 681, pp. 229-233; Nos. 682, 683, pp. 221-4; Nos. 684, 685, pp. 213-6; Nos. 686, 687, pp. 256-260; Nos. 688, 689, pp. 245-9; Nos. 690, 691, pp. 262-6; Nos. 692, 693, pp. 228-32; Nos. 694, 695, pp. 221-5; Nos. 696, 697, pp. 219-21; Nos. 698, 699, pp. 213-17; Nos. 700, 701, pp. 229-232; Nos. 702, 703, pp 211-15; Nos. 704, 705, pp. 217-21.)

(b) Where a case is here upon an appeal involving its merits, the action of the court below in taxing costs is a subject of review.

In *Burns* v. *Rosenstein*, 135 U. S., 449, 456, 34, L. Ed., 193, 196, Mr. Justice Harlan said:

> "It was said in *Florida Int. Imp. Fund* v. *Greenough*, 105 U. S., 527, that 'ordinarily a decree will not be reviewed in this court for costs merely in a suit in equity, although the court has entire control of costs as well as the merits where it has possession of the case on appeal from final decree.'"

In *Citizens Bank* v. *Cannon*, 164 U. S., 319, 323, 41 L. Ed., 451. 453, Mr. Justice Shiras said:

> "As a general thing, an appeal will not lie in the matter of costs alone. But such appeals have been sustained in par-

ticular circumstances, as, for instance, where the costs have been directed to be paid out of a trust fund. In *Internal Improv. Fund* v. *Greenough*,. 105 U. S., 588, this court said, through Mr. Justice Bradley, that the objection to an appeal on the ground of its being from a decree for costs only, is untenable. However, in the present case, the appeal was not taken from the decree on the sole ground that costs were wrongfully awarded, and, as the entire decree is before us, it is competent for us to consider whether, when a circuit court dismisses a suit for want of jurisdiction, it can give a decree for costs, including a fee in the nature of a penalty, to the defendants' counsel."

In *O'Reilly* v. *Morse*, 15 How., 62, 124, 127, 14 L. Ed., 601, 628, 632, a decree below as to cost, reviewed with the merits, was reversed. So the rule was applied in *Nashville* v. *Cooper*, 6 Wall., 250, 18 L. Ed., 852; *Inglee* v. *Coolidge*, 2 Wheat., 363, 4 L. Ed., 261; *Hornthal* v. *Keary*, 9 Wall., 566, 19 L. Ed., 562.

(c) The legislature in 1907 (Laws Mo. 1907, p. 13, sec. 61; Rec., 5281) appropriated $20,000, and in 1909 (Laws Mo. 1909, pp. 5, 6, sec. 7c, 7d, 7e; Opinion, Rec., 5327) over $40,000 for the expenses of this and the companion rate cases. There was, therefore, no difficulty in the state making payment of costs. But if the appropriation had not been made, this was no reason for not assessing costs against the state officers. Judge McPherson was wrong in entertaining a contrary view. In *U. S.* v. *Boutwell*, 17 Wall., 604, 21 L. Ed., 721, 722, Mr. Justice Strong, in dealing with the same question, among other things, said:

"Thus it is the personal default of the defendant that warrants impetration of the writ, and if a peremptory mandamus be awarded, the costs must fall upon the defendant."

In *U. S.* v. *Schurz*, 102 U. S., 407, 26 L. Ed., 219, Mr. Justice Miller said:

"In this case, a motion is made to modify the order that each party should pay his own costs and give the plaintiff his costs against the defendant. Our first impression was that as the defendant was sued in regard to the manner in which he had discharged certain official duties as Secretary of the Interior, in which no intentional wrong was charged or proven against him, it would be unjust to make him pay the costs of the proceeding, out of his own pocket. But a careful examination of the authorities leaves us no option but to follow the rule that the prevailing party shall recover of the unsuccessful one the legal costs which he had expended in obtaining his rights. In the case of *Kendall* v. *U. S.*, 12 Pet., 524, which is the leading case establishing the right of a citizen to the use of the writ of mandamus to compel a public officer to perform a duty merely ministerial, the relator recovered his costs. The duty in that case, as in the present, was one demanded of a cabinet officer, namely: The Postmaster-General, and which he refused to perform. It is obvious that he thought he was right in refusing to do the act demanded of him, yet this court, as shown by the report of the case, rendered judgment for costs against him. In the case of *U. S.* v. *Boutwell*, 17 Wall., 604, which was the case of a writ of mandamus against Boutwell, as Secretary of the Treasury, and which the court held to be abated by his retirement from office, it was said: 'It is the personal default of the defendant and that warrants the impetration of the writ, and if a peremptory writ of mandamus be awarded, the costs must fall upon the defendant.' And it is argued that as it would be unjust to make the successor in office of the delinquent secretary pay the cost of defending the action of his predecessor, the writ must of necessity abate. We cannot in the face of these cases, refuse the order for costs, however much we might wish it were otherwise. There may be a contingent or other fund of the department out of which these costs can be paid. If there is no such provision, Congress may provide for it or enact generally that when the officers of the government are sued with reference to the manner in which they have performed or failed to perform their official duties, they would be relieved from expense of the suit if they have acted with good

motives and upon reasonable grounds as in revenue seizures and similar cases."

(d) The state's one-half of the costs below was $9,000 (Laws Mo. 1909, p. 6, sec 7e). The long record was not made by the railroads. About three out of every four pages of the testimony of witnesses was made up of needless cross-examination as to figures, when the state's experts conceded them to be correct. If there ever was a case where costs should have been taxed it should have been here. Every effort was made to evade the jurisdiction and defeat the decrees. When the law of 1905 was repealed, a wrongful attempt was made to keep the penalties in force. For this reason only, it was necessary to use the evidence before the master. The court below thought there should be a division because of the large amount of evidence taken before that master. It ignored the fact that it was only used by consent and related solely to the rates under the repealed act of 1905. The state needlessly kept in existence the litigation as to that act, and the railroad company should not be charged with expense upon account thereof. When the trial was had and the state's experts fully conceded the correctness of the figures, there was no need to use the large part of that testimony taken before the master produced by the state upon original and cross-examination. Here, harsh and unreasonable laws were passed; delays were sought; jurisdiction attempted to be evaded. If state officers can so conduct themselves and when defeated be rewarded by the allowance of costs, encouragement is lent to the destruction of property, and the outcry against the lawful action of judicial tribunals. The amount is not great, but the principle involved is such that we deem it a duty to present it. The reasons given by the learned judge below do not justify the taxation of costs against any complainant and the decree in this respect should be reversed. Especially is this true when one

considers the unnecessary and tremendous costs incurred upon these appeals.

Respectfully submitted,

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For C. B. & Q. R. R. Co.

O. M. SPENCER,
J. G. TRIMBLE,
For Q. O. & K. C. R. R. Co.

WELLS H. BLODGETT,
JAMES L. MINNIS,
For Wabash R. R. Co.

R. A. BROWN,
For St. J. & G. I. Ry Co.

JOHN H. LUCAS,
For K. C. C. & S. Ry. Co.

JOHN BARTON PAYNE,
For C. G. W. Ry. Co.

BURTON HANSON,
H. H. FIELD,
For C. M. & St. P. Ry. Co.

SILAS H. STRAWN,
EDWARD L. SCARRITT,
For C. & A. R. R. Co.

APPENDIX I.

"Section 1384a. The board of railroad and warehouse commissioners are hereby authorized, empowered and required to fix, maintain and establish just and reasonable freight rates on all classes of freights, from, to and between all points and stations upon and along all lines of railroads in this state; and said board is authorized and empowered to reduce, change or modify any and all such freight rates so fixed and established as hereinafter provided. And said board may, of its own motion, and shall, upon the sworn complaint of any shipper, mayor, councilman, alderman, or trustee of any city, town or village, first giving five days' written notice to the railroad company affected, or complained against, proceed to fix, establish, modify or reduce the freight rates or charges of any such railroads, to or between any and all points or stations in Missouri; and any and all orders fixing, establishing, modifying or reducing any such freight rates or charges shall be the judgment of said board and constitute the legal rates or charges that such railroad company may collect for the transportation of freight from, to and between its stations in Missouri; and said board shall, immediately upon the fixing, establishing, modifying or reducing the freight rates or charges of any railroad company, notify such railroad in writing thereof; and said railroad shall comply with the orders and judgments of said board with reference to such freight rates or charges, within ten days after such notice. And if any railroad fails, refuses or neglects to put the rates so ordered by said board into effect and operation within ten days after notice, the board shall submit a certified copy of its order to the attorney general of the state, with notice that such railroad (designating the same), has failed to comply therewith. Until the attorney general, upon receipt thereof, shall immediately institute suit in the name of said board of railroad and warehouse commissioners against such railroad, in the supreme court of the state, for mandamus or other proper remedy, to enforce said order of said board.

Section 1384b. All railroad companies doing business in this state shall, upon the request of the board of railroad and ware-

house commissioners, furnish to said board copies of all its schedules of freight rates and charges, and all other papers and documents, including bills of lading and contracts for transportation of freight affecting in any way the transportation of freight within, into and from the state. And said board shall have full power and authority to examine all officers, agents and employes of said railroad companies, and all other persons, under oath or otherwise, to procure the necessary information to make just and reasonable freight rates or charges, and to ascertain if the freight rates so fixed by said board are being observed or violated. And said board shall have power to administer oaths, to issue subpoenas for the persons and papers, examine witnesses and to enforce the same in like manner as the circuit courts of this state. And in the issuance and enforcement of the papers and process above, the jurisdiction shall be co-extensive with the state."

APPENDIX 2.

"An act, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled "Corporations, private," by repealing section 1194 of said Revised Statutes, being part of Article IV of said chapter concerning railroad classification—charges—commissioners, and to enact in lieu thereof, the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof.'

Section 1. Repeals section 1194 and enacts three other sections in lieu.

Section 1194. Fixes maximum freight rates.

Section 1194a Penalty for violation.

1194b. Repeals conflicting acts, rules and regulations.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That section 1194 of the Revised Statutes of Missouri, 1899, concerning the regulation of freight charges, being part of Article IV, of chapter 12, entitled 'Corporations, private,' be and the same is hereby repealed and the following, to be known as sections 1194, 1194a, 1194b, of said Revised Statutes, be enacted in lieu thereof, so that said sections shall be collocated between the existing sections 1193 and 1195 of said Revised Statutes of 1899.

Section 1194. No individual, company or corporation owning, operating, managing or leasing any railroad or part of railroad, designated in section 1191 as in classes A, B, or C, shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes herein designated, than is hereinafter provided for, namely: Class D, in car loads of 40,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class E, in car loads of 24,000 pounds minimum weight not exceeding 5 cents per one hundred pounds for the first 25 miles and not exceding one-half cent per hundred

pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half per hundred pounds for each additional 25 miles or fractional part thereof. Class F, in car loads of 30,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds for the first 25 miles, and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles or fractional part thereof. Class G, in car loads of 30,000 pounds minimum weight, not exceeding 5 cents per one hundred pounds for the first 25 miles and not exceeding one-half cent per hundred pounds for the second 25 miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional 25 miles, or fractional part thereof. Class H, in car loads in common cars, measuring inside from 29 feet to and including 30 feet and 6 inches in length (to be known as standard cars) not exceeding $6.00 per car load for the first 25 miles, and not exceeding $3.00 per car load for the second 25 miles, or fractional part thereof, and not exceeding $2.00 per car load for each additional 25 miles, or fractional part thereof, of over twelve miles. For the carriage of any of the articles comprising class H in cars of other length for the distances above specified, the following percentage of the foregoing rates per car load shall not be exceeded, namely: In cars of length less than 29 feet, 94 per cent; in cars of length over 30½ feet to and including 32 feet, 104 per cent; in cars of length over 32 feet to and including 33 feet and 9 inches, 107 per cent; in cars of length over 33 feet and 9 inches to and including 36 feet, 110 per cent; in cars of length over 36 feet to and including 38 feet, 113 per cent; in cars of length over 38 feet to and including 40 feet, 116 per cent; in cars of length over 40 feet to and including 42 feet, 125 per cent; in cars of length over 42 feet to and including 44 feet, 135 per cent; in cars of length over 44 feet, 140 per cent of the rates herein specified for cars of the standard length of 29 feet to and including 30 feet and 6 inches, shall not be exceeded. All the foregoing lengths to be taken by inside measurements. Class 1, in car loads of 20,000 pounds minimum weight, not exceeding $14.00 per car load for the first 25 miles and not exceeding $2.00 per car load for the second 25 miles, or fractional part thereof, and not exceeding $2.00 per car load for each additional 25 miles, or fractional part thereof. (Class) In computing the rate of freight according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another.

Section 1194a. That for the violation of the foregoing sections the railroad company so offending shall forfeit and pay to

any person thereby affected the freight rate charged, demanded, or received in excess of the rates prescribed in said section, together with all actual damages caused thereby, to be recovered in any court having jurisdiction thereof by the existing law. And (if) the plaintiff in such action recover judgment therein, the court shall treble the same and the plaintiff shall on motion be allowed a reasonable attorney's fee for bringing the action.

Section 1194b. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies or the railroad and warehouse commissioners of this state in conflict with the provisions of this act are hereby repealed and declared void."

Approved April 15, 1905.

APPENDIX 3.

"An act to repeal an act of the 43rd general assembly, approved April 15, 1905, entitled 'An act to amend chapter 12 of the Revised Statutes of Missouri, revision of 1899, entitled 'Corporations, private, by repealing section 1194 of said Revised Statutes, being part of Article IV of said chapter, concerning railroad classification, charges, commissioners, and to enact in lieu thereof the following new sections providing for the regulation of freight charges by railroads and the recovery of penalties for the violation thereof,' and to repeal an act of the 43rd general assembly, approved April 14, 1905, entitled 'An act to amend Article IV, chapter 12, of the Revised Statutes of Missouri, 1899, entitled "Railroad classifications, charges, commissioners," by adding a new section thereto, to be known as section 1195a, fixing the charges for carrying undressed stone, crushed rock and building or paving brick,' and to enact in lieu thereof certain new sections, to be known as sections 1194, 1194a-1, 1194b-1 and 1194c-1, providing for the regulation of freight charges by railroads and prescribing the punishment for a violation thereof, which new section shall read as follows:

Section 1194. Classification and charges for carrying freight in car load lots.

Section 1194a. Penalty for violation.

Section 1194b. Not to relieve railroad from complying with other laws.

Section 1194c. Repealing conflicting acts.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI AS FOLLOWS:

Section 1. That sections 1194, 1194a and 1194b of an act of the 43rd general assembly, approved April 15, 1905, concerning railroad classifications, charges, commissioners, and providing for a penalty for a violation thereof, said sections being enacted in lieu of section 1194, chapter 12 of the Revised Statutes of Missouri, 1899, in 'corporations, private,' and section 1195a of an act of the 43rd general assembly, approved April 14, 1905, concerning railroad classifications, charges, commissioners, fixing charges for carrying undressed stone, crushed rock and building or paving brick, be and the same are hereby repealed, and the fol-

lowing to be known as sections 1194, 1194a-1 1194b-1 and 1194c-1 of said revised Statutes, are enacted in lieu thereof:

Section 1194. No individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1191 as in classes A, B or C, shall demand, charge or receive a greater or higher rate for carrying from initial to terminal points in this state articles named in the several classes and the commodities herein designated than is hereinafter provided for, namely: Class D, in car loads of 40,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles, or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class E, in car loads of 24,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class F, in car loads of 30,000 pounds minimum weight, not exceeding five cents per one hundred pounds for the first twenty-five miles, and not exceeding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class G, in car loads of 30,00 pounds minimum weight, not exceeding five cents per one hundred pounds, for the first twenty-five miles, and not exceding one-half cent per hundred pounds for the second twenty-five miles or fractional part thereof, and not exceeding one-half cent per hundred pounds for each additional twenty-five miles or fractional part thereof. Class H, in car loads, in common cars, measuring inside from 29 feet to and including 30 feet and 6 inches in length (to be known as standard cars), not exceeding $8.00 per car load for the first twenty-five miles, and not exceeding $4.00 per car load for the second twenty-five miles or fractional part thereof, and not exceeding $2.00 per car load for each additional twenty-five miles or fractional part thereof of over twelve miles. For the carriage of any of the articles comprising class H, in cars of other lengths for the distances above specified, the following percentages of the foregoing rates per car load shall not be exceeded, namely: In cars of length less than 29 feet, 94 per cent; in cars of length over 30½ feet to and including 32 feet, 104 per cent; in cars of length over 32 feet to and including 33 feet and 9 inches, 107 per cent; in cars of length over 33 feet and 9 inches to and including 36 feet, 110 per cent; in cars of length over 36 feet to and includ-

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ing 38 feet, 113 per cent; in cars of length over 38 feet to and including 40 feet, 116 per cent; in cars of length over 40 feet to and including 42 feet, 125 per cent; in cars of length over 42 feet to and including 44 feet, 135 per cent; in cars of length over 44 feet, 140 per cent of the rates herein specified for cars of the standard length of 29 feet to and including 30 feet and 6 inches shall not be exceeded. All the foregoing lengths to be taken by inside measurements. Class I, in car loads of 20,000 pounds minimum weight, not exceeding $14.00 per car load for the first twenty-five miles, and not exceeding $2.00 per car load for the second twenty-five miles or fractional part thereof, and not exceeding $2.00 per car load for each additional twenty-five miles or fractional part thereof. For a car load of 40,000 pounds minimum weight undressed stone, crushed rock, sand, railroad ties, cordwood, building or paving brick, not exceeding 40 cents per ton of 2,000 pounds to the ton for the first fifty miles or fractional part thereof, and not exceeding five cents per ton per car load for the next ten miles or fractional part thereof, and not exceeding 5 cents per ton per car load for each additional ten miles or fractional part thereof. In computing the rate of freight, according to the provisions of this article, the distance shall be computed from the point where it is received to the point of destination in the state, notwithstanding it may pass from one road to another.

Section 1194a. Any individual, company or corporation owning, operating, managing or leasing any railroad, or part of railroad, designated in section 1194, or any officer, agent, representative or employe thereof who violates the provisions of section 1194, shall be adjudged guilty of a misdemeanor, and on conviction, shall be punished by a fine of not to exceed $5,000.00: Provided, that the money received from any fine under the provisions of this act shall be paid into the school fund in the county in which the case is prosecuted.

Section 1194b. This act shall not have the effect of relieving any person, partnership or corporation, owning or operating any railroad in this state from any liability or penalty heretofore incurred for failure to comply with any law of this state.

Section 1194c. All acts and parts of acts, and all rules and regulations, freight schedules, classifications and groupings by railroad companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void."

Approved March 19, 1907.

APPENDIX 4.

"AN ACT to amend article 4, chapter 12, Revised Statutes of Missouri of 1899 by adding a new section thereto, to be known as section 1195a, and relating to freight charges and classifications.

SECTION

1. Fixing freight charges on fruits.
2. Inconsistent acts repealed.
3. Penalty for violation.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI, AS FOLLOWS:

Section 1. That article 4, chapter 12, of the Revised Statutes of Missouri, 1899, entitled 'Railroad classification, charges, commissioners,' be and the same is hereby amended by adding a new section thereto, to be known as section 1195a, which said section shall read as follows:

Section 1195a. No individual, company or corporation owning, operating, managing or leasing any railroad or part of railroad in this state, shall charge for or receive for carrying apples and pears in car loads of 24,000 pounds minimum weight, more than six cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not more than one cent per hundred pounds for each additional twenty-five miles or fractional part thereof. For strawberries, peaches, grapes and other berries in carloads of 18,000 pounds minimum weight, not exceding fifteen cents per hundred pounds for the first twenty-five miles or fractional part thereof, and not exceeding two cents per hundred pounds for each additional twenty-five miles or fractional part thereof.

SEC. 2. All acts and parts of acts and all rules and regulations, freight schedules, classifications and groupings by railroad companies, or the railroad and warehouse commissioners of this state, in conflict with the provisions of this act, are hereby repealed and declared void.

SEC. 3. Any individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this state, violating the provisions of this act, shall, on conviction, be adjudged guilty of a misdemeanor, and subject to a fine not to exceed one thousand dollars for each offense."

Approved March 19, 1907.

APPENDIX 5.

"An Act to provide transportation on railroads for the shippers of freight in this state in carload lots.

SECTION 1. Railroads to issue to certain shippers transportion.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI, AS FOLLOWS:

SECTION 1. Whenever any railroad company or corporation doing business within the limits of this state shall receive any live stock to be shipped over the said road or roads by carload lots, said corporation shall, in consideration of the price paid for said carload lots, issue to the shipper, his agent or employe, at the time of making out the contract or bill of lading, a round trip ticket to and from said points designated in said bill of lading, without further expense to said shipper, provided that the points of destination are within this state, and in case said point of destination is without this state, then said railroad corporation shall issue to such shipper, his agent or employe a round trip ticket to a point within this state nearest to the point without this state to which said shipment of live stock is shipped: Provided, that in case said shipper shall ship more than one car load at any one shipment the said railroad corporation shall not be compelled to give to said shipper more than one round trip ticket with such shipment, which said ticket shall be good on the freight train on which said stock is shipped, and on all trains on said road carrying passengers on the return trip, and shall be good for a period of ten days, and any railroad company or corporation willfully violating the provisions of this section, or which shall fail, neglect or refuse to furnish and deliver such ticket to such shipper, his agent or employe, shall forfeit and pay, as a penalty, to said shipper, not less than three hundred dollars nor more than five hundred dollars, to be recovered by civil action in any court of competent jurisdiction."

Approved April 4, 1907.

APPENDIX 6.

"Sec. 1191. ROADS CLASSIFIED.—All railroads in the state of Missouri are hereby divided into three classs, to be known as class A, class B and Class C. Class A shall include all through or trunk line railroads. Class B shall include all of the branch roads owned, leased or occupied by such through or trunk line railroad companies or corporations. Class C shall include all other railroads or parts of railroads owned, leased or occupied, or which may hereafter be owned, leased or occupied in this state, either wholly or in part.

Sec. 1192. PASSENGER CHARGES REGULATED.—Any individual, company or corporation owning, operating, managing or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In class A, not exceeding three cents per mile, and in classes B and C not exceeding four cents per mile: *Provided*, that no such individual, company or corporation shall charge, demand or receive any greater compensation per mile for the transportation of children of the age of twelve years or under, than one-half of the rate above prescribed; *and provided further* that the rates for transportation herein prescribed may be reduced, as hereinafter prescribed."

APPENDIX 7.

"AN ACT to repeal sections 1191 and 1192 of chapter 12, article 4, Revised Statutes of Missouri, 1899, entitled 'Railroad classification-charges-commissioners,' by striking out sections 1191 and 1192 and enacting the following new sections in lieu thereof to be known as sections 1191 and 1192 and 1192a.

SECTION 1191. Classification of railroads.

SECTION 1192. Passenger charges regulated.

SECTION 1192a. Penalty for violation.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI AS FOLLOWS:

SECTION 1. That all of sections 1191 and 1192 of chapter 12, article 4, of the Revised Statutes of Missouri, 1899, be and the same are hereby repealed and three new sections be enacted in lieu thereof, to be known as sections 1191 and 1192 and 1192a, so that said sections shall read as follows:

SECTION 1191. Roads Classified.—All railroads in the state of Missouri are hereby divided into four classes, to be known as class A, class B, class C and class D. Class A shall include all through or trunk line railroads and all branch roads owned, leased, controlled or occupied by such through or trunk line railroad companies or corporations. Class B shall include all other railroads or parts of railroads owned, leased, controlled or occupied, or which may hereafter be owned, leased, controlled or occupied either wholly or in part, by any trunk line company or corporation. Class C shall include all other railroads of a greater length than forty-five miles. Class D shall include all roads less than forty-five miles in length not owned, leased, controlled or occupied by any trunk line company or corporation.

Section 1192. Passenger charges regulated.—Any individual, company or corporation owning, operating, controlling or leasing any railroad or part of a railroad in this state, in the several classifications as herein prescribed, shall be limited to a compensation per mile, for the transportation of any person with ordinary baggage not exceeding one hundred pounds in weight, as follows: In classes A, B and C, not exceding two cents per mile, and in class D, not exceeding four cents per mile. Provided, that no such individual, company or corporation shall charge, demand or

receive any greater compensation per mile for the transportation of children of the age of twelve years or under than one-half of the rate above prescribed; and provided further, that the rates for transportation herein prescribed may be reduced, as hereinafter provided.

Section 1192a. Any individual, company or corporation, or any agent or officer thereof, who shall violate any of the provisions of section 1192 of this act, shall be deemed guilty of a misdemeanor, and upon conviction, shall pay a fine of not less than one hundred nor more than five hundred dollars."

Approved February 27, 1907."

APPENDIX 7A.

"Section 1136. Schedule of maximum rates posted in depots—duty of commissioners. Every such common carrier shall print and keep for public inspection schedules showing the rates for freight which such carrier has established and which are in force at the time upon the railroad or railroads operated by it as defined in section 1128. Said rates shall be reasonable and just, and shall not in any case exceed the maximum rates which are or which may hereafter be established by law. Schedules as aforesaid shall contain the classifications of freight in force upon such railroad or railroads, and if there be any rules or regulations which change, determine or affect any part of the aggregate of such rates, fares and charges, such rules and regulations shall accompany such schedule. Copies of such schedule, also such rules and regulations, if any, shall be kept posted in every depot or station upon any such road in such place where the same can be conveniently inspected by every person interested in the same. Copies of such schedules, also such rules and regulations, if any, shall be filed with the railroad commissioners of the state of Missouri, and from the date of such filing, the rates, fares and charges specified in such schedule, not being in excess of any statutory maximum rates now or that may hereafter be in force, shall be deemed the established rates, fares and charges of such common carrier until the same is changed as in this article provided. No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any such common carrier in compliance with the requirements of this article, except after ten days' public notice which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares and charges will go into effect; and the proposed changes shall be plainly indicated upon the schedules in force at the time, and kept for public inspection in like manner as herein provided. Reductions in such published rates, fares and charges may be made without previous public notice, but whenever any such reduction is made, notice of the same shall be immediately publicly posted, and the changes made shall be immediately plainly indicated upon the schedules in force at the time and kept for public inspection, and copies of the schedules con-

ining such changes shall be furnish filed with said railroad commissioners. Such changed schedules shall become the established schedules from the date of such public notice until changed as herein provided for changing schedules of rates, fares and charges. When any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this article, the same not being in excess of any statutory maximum rates now or that may be hereafter in force, it shall be unlawful for any such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of property or for any service in connection therewith than is specified in such published schedule of rates, fares and charges as may at the time be in force, except as herein may be specifically permitted. It shall be the duty of the railroad commissioners to see that all schedules of rates prepared and adopted by common carriers are reasonable and just, and they may, upon complaint, of any person, or upon their own motion and without complaint, make inquiry from time to time, and determine whether the schedule of rates prepared and adopted by any such common carrier is reasonable and just." (R. S., 1909.)

APPENDIX 8.

ORAL OPINION IN MAXIMUM FREIGHT RATE CASES.

KANSAS CITY, MO., July 12, 1905.

Philips, J.—Gentlemen, in these cases of the railroads against the state officers, commissioners and others, known as the "Maximum Freight Rate cases," the court has to say that on a conference between Judge McPherson and myself, after these cases were submitted on preliminary hearing, it was concluded to express nothing more than a mere tentative opinion, reserving more definite conclusions until the final hearing of these cases.

On some of these questions I do not care to express an opinion at this time other than give our first impressions arising on preliminary questions.

The first objection that is made to the bills is that the actions are premature. That until the railroad comissioners take some affirmative action in the way of establishing a schedule of rates under the provisions of the general statutes applying not only to the classified objects or subjects mentioned in the Act of the Legislature, but also as to other schedules not included in the carload rate fixed by the act. That it is impossible to determine even apparently in the first instance, whether the maximum rates fixed on these articles is excessive or not, and that until that is done, there is no probability or small possibility of any affirmative action being taken by those in authority or in position to claim against the offending carriers.

With respect of that it seems to us to be sufficient to say that by the provisions of the existing statute, particularly Section 1188 of the General Statutes of Missouri, it makes it the duty of the carrier at once, and makes the carrier amenable to the rate of 1905, because he is a party to the proposed schedule, which will not exceed the maximum rate fixed by law or which may hereafter be fixed.

The railroad commissioners have no function to perform, or rather no power, so far as they are concerned, to fix a rate that is in excess of the maximum rate, because that is fixed by law—by statute—and the carrier at once becomes amenable to the penalty

prescribed for violating this statute, and at once becomes amenable to action by the railroad commissioners, or by the state officers to proceed against them in the event they should exact for carriage of any of the prescribed articles a greater rate than that fixed as the maximum. So that, without any action at all, the moment that the carrier should demand or receive from the shipper a higher rate than the maximum prescribed in this statute, it becomes amenable to the law, and it certainly is the right of the carrier to have the question determined as a matter of law as to whether he is amenable to that statute or not.

It seems to me that he ought to be permitted to take that action to test the validity of that rate established by law as much so as if it had been established by affirmative order of the railroad commissioners, the right to complain of it because it interferes daily and hourly with the shipments that he may propose to make over and above that maximum rate, that is, independent of any action that the railroad commissioners may take in the matter of establishing a schedule of rates for the railroad companies.

It is next objected that inasmuch as in determining the question of fact as to whether the maximum rate fixed by the legislature upon a specified article by the car load is oppressive or confiscatory of the property of the railroad company, we must take into consideration the whole earnings of the railroads; the amounts realized on all classes of shipments; so that while it may be true that the maximum rate fixed by the statute for shipping the particular specified articles may be low and independently considered, carriage could not be made without sacrifice or loss to the carrier, yet, in determining whether or not the railroads are to suffer as a result, we must take into consideration all the rates established by the schedules approved by the railroad commissioners.

In other words, as it seems to us to be the logical sequence of the argument made by counsel for the respondents in this case, that the railroad commissioners, if they should ascertain that the maximum rates established by this act were too low, they might average their schedule by increasing the rates on other articles than those specified in the act of the legislature.

In answer to that it occurs to the court that the bills in this case not only aver but that would be implied, that the existing rates specified in the schedules of carriage and which presumptively had the approval of the railroad commissioners, are reasonable rates on all articles as heretofore understood, and that by 'reasonable rates' implies such as do not unduly burden the shipper and such as do not unduly increase the income of the railroads. They are reasonable in the meaning of the constitution. The presumption, therefore, it seems to us, is to be indulged on this preliminary hearing, that those rates are to be maintained until chang-

ed by order of the railroad commissioners, and if, as the bill charges (and that fact is conceded on this hearing) that they cannot carry the articles specified in the legislative Act of 1905 without loss, not only without profit to the railroad companies, but with an absolute loss for carrying it, would not cover the expenses of transportation, all things considered, for the purpose of this bill, it is to be assumed that the rates existing on the other articles being reasonable, the presumption is that they will be maintained until it is altered by the railroad companies.

I might observe in this connection that while it is true that the courts in determining the question as to the reasonableness or unreasonableness of these rates prescribed by legislative acts, agree that a great many questions enter into the consideration and determination of that matter, that is the reasonableness and unreasonableness; you must take into account what it earns on all articles carried and shipped, and that the result is to be drawn from an aggregation and consideration of all these matters. But the supreme court has never said, and in my humble judgment it never will say, that in order to justify and to validate the particular act of the legislature fixing the maximum rate upon particular articles of merchandise or the subjects of carriage, that they can, in its relation to other subject-matters of shipment, minimize the shipment on one article, by exaggerating the amount of charges on schedules on other articles. The underlying policy and inspiration of the Interstate Commerce Act itself is equity among all patrons of these public carriers. The carrier is prohibited from discriminating. He must be just alike to all comers, and in determining whether he deals justly and fairly and equitably with all patrons of the road, consideration must always be had in the relation of one article shipped to another. For instance, we could not say that because a man wants to ship a carload of cattle from here to St. Louis that the car should be taken from here to St. Louis for a dollar a car, and then say as to a man who wanted to ship a half dozen cows or a half dozen sheep that they might take them for $10. That would be discrimination unquestionably among these shippers, and it cannot be that the law would uphold an act of the legislature that would justify discrimination in favor of one shipper as against the amount to be paid by the other, in order to ascertain this equation, in determining whether the railroad can do this business without a loss or not.

The serious question is presented by the objections to this bill on this preliminary hearing as to that feature of it that undertakes to restrain certain shippers who are made parties defendant with the officers of the state to this bill. Now, it is true that while this statute authorizes any shipper who is charged a greater

rate than the maximum fixed by the statute to maintain an action for damages against the carrier to recover the excess paid, and that the court by its judgment may treble the amount of the damages thus ascertained, it is true that the bills do not charge that any shippers, or particularly those who are designated as defendants in this case, are threatening to bring such suits. That, of course, could not be alleged, for the reason that this bill was filed as soon as the law became operative under the constitutional provisions of the statute when the act of the legislature would go in force. If bills can lie against them at all, it is upon the theory outlined with respect to the right to maintain a bill against the state officers. That they have a right to challenge the law on its face as soon as it becomes operative, in advance of any affirmative action taken by parties is not denied, in order to have it determined and that the railroad companies and the shippers may know what to depend upon.

Of course, back of all this law and all this legislation, in regulating shipping rates, the parties really in interest whose rights are to be protected, are the shippers. The public policy of the state is predicated upon the rights of the shippers, and it is intended for their protection as patrons of the public servants, the railroad companies and common carriers. The shippers are the parties really in interest. The railroad commissioners, the attorney general and all the officers of the state and of the counties, in effect represent the rights and interests of the shippers because they are the only parties—they are the real parties whose rights and interests are to be affected by this law. They have singled out a number of shippers along the lines of these roads and made them defendants, as representatives of a class,—of all shippers—and the allegation of the bill is simply that they will bring suits.

Now it might be that these shippers who were made defendants are to come in by answer and disclaim any purpose to bring such suits. It would be a question whether the injunction could still go against them or not, and in addition to all that, it is always competent for a court of equity in cases of this character, especially, to determine who shall pay the costs of such a proceeding. It might in the judgment of the court be unjust and inequitable before parties have brought suit or taken such affirmative action, to mulct them of the costs of this suit. Whether or not a court should render a decree against them, notwithstanding the fact that they should come in and disclaim any purpose to bring such suits and say that they would not bring them as charged in the bill, whether the court should go further or not is not necessary at this time to express any opinion. Without any purpose whatever to criticise the representatives of the state, the respond-

ents in this case who are here, it does seem to me that it is to the interest of all parties concerned, to the state, to the public and to these carriers, that this question of the validity of this act of 1905 ought to be determined at the earliest date possible, and to that end, that the case ought to be brought to an issue and put in shape so that these questions could be finally determined. For instance, right on the face of this act of the legislature there is a question raised here that the act is leveled against all individuals and corporations who may carry these articles affected by this act. When it comes to the section of the statute that authorizes the shipper to maintain an action and treble damages, it applies only to railroad companies and not to individuals who may be running a railroad, and therefore the contention is that on the face of the statute it is discriminatory. It discriminates against the railroad company in this respect by subjecting it to this liability when it does not subject an individual who may own a railroad and be carrying goods as a railroad to the same liability. Now there are two answers made to that in argument. One is that the bill does not aver on its face that there are individuals who are operating railroads in the state and who would be common carriers; and in the second place, that although the section of the statute referred to which subjects the railroads to trebled damages at the suit of any shipper applies only to railroad companies, that it is not infrequently the case that an act or a statute may be void in part and good in part, that the vicious part of it may be eliminated and that which is good may stand. It seems to me that if this objection to the statute is well taken, that that section discriminates against the railroad company and in favor of an individual carrier. The principle or rule invoked about the statute being good in part and bad in part does not apply to this sort of a case. The objection to this statute is that it discriminates. It subjects only one class of citizens to a liability and to a penalty without subjecting another citizen engaged in the same line of business and doing the same acts to the same sort of penalty, and therefore it is a discrimination on its face against one citizen and in favor of another, and all such statutes certainly run counter to the provisions of the Fourteenth Amendment because they are unequal in their provisions. Whether the facts that have been developed that there are no individuals in this state running railroads or performing the functions of a common carrier in this state, would have any effect on that statute is not necessary to be considered now, but as stated by the court at the hearing, it would seem to me that for the purpose of this preliminary hearing, the legislature which made the statute having mentioned individuals, the presumption ought to be directed to the legislative

declaration that there are such individuals subject to the provisions of the statute, otherwise they would not have been enumerated by the legislature. If it is a legislative declaration that there was an interest to legislate with respect to individuals operating railroads who then owned them or who might hereafter operate railroads, it is not necessary to go further into a discussion of that matter.

The result is, it seems to me, that as this is a case which ultimately will have to be determined by the Supreme Court of the United States, that to avoid the delay consequent to waiting until the railroad commissioners take some affirmative action, wait until some shipper brings an action against the railroad, have these suits scattered all over the state, with the trouble and expense and delay that is consequent upon it to go to the Supreme Court through that sort of a channel, it is a very proper case where a court of equity ought to take hold of the matter and let these questions be settled at the earliest date possible because it has got to come to this conclusion at last, and delay will accomplish nothing, and in that view of the case, the temporary restraining order will be granted.

Counsel can draw the order. I have not read the temporary restraining order that was issued by Judge McPherson, but it will only be necessary to continue that in force, and the only remaining question is about the amount of bond that shall be given by these respective respondents. Of course so far as the defendants who represent the state in the matter are concerned they have no interest in the matter except such as is official. They have no pecuniary interest in the result and there could be no occasion to protect them except as to the matter of costs. The bond would inure practically for the benefit of any shippers who might be delayed in bringing their actions. Of course, it is entirely speculative what would be the probabilities of any injury to them by the delay consequent upon the pendency of this suit, and our conclusion was that a bond of $5,000 by each of these railroad companies would be sufficient. The amount of it, of course, would be increased or diminished as the acts might appear.

I will make the amount of the bond in each case $10,000, and of course if at any time a number of suits are brought by shippers, and that fact is brought to the attention of the court, the amount of bond can be increased at any time.

I will change the bond by making it inure to the benefit of the defendants or any of them or all such other parties who may become parties to this suit, so that if they want the benefit of the bond they can come in. You can make that change in the form of the bond as presented.

APPENDIX 9.

REPORT

OF

THE ATTORNEY-GENERAL

ON THE

MAXIMUM FREIGHT RATE LAW

TO THE

44th GENERAL ASSEMBLY

December 26, 1906.

MESSAGE.

January 18, 1907.

To the Senate and House of Representatives:

I have the honor to transmit to you the report of Attorney General Hadley, as to the maximum freight rate law litigation. This law was enacted by the 43rd General Assembly, but its enforcement was enjoined by the federal courts, until the validity of the measure could be determined. A great deal of evidence has been taken concerning the reasonableness of the rate fixed in the maximum freight rate law, and at my request the Attorney General prepared a report for your information, giving the salient points developed by the testimony.

In order that you may have the aid of these facts in your further consideration of the question of freight rates, send you this report, to be considered in connection with my recommendations on this subject, in my biennial message, and for such other action as you may deem proper and right.

Respectfully,

JOS W. FOLK,
Governor.

REPORT.

LEGAL DEPARTMENT, STATE OF MISSOURI.

December 26, 1906.

Hon. Joseph W. Folk, Governor of Missouri, Jefferson City, Mo.:

Dear Sir—I beg to acknowledge the receipt of your letter of December 10th, asking as to the status of the litigation now pending in the United States Circuit Court for the Western Division of the Western District of the State of Missouri, concerning the maximum freight rate law enacted by the last General Assembly, and also for such salient facts as may have been developed by the testimony, in order that you may advise the incoming General Assembly of the condition of this litigation, and any other facts which may be of value in the enactment of further legislation.

An answer to this letter has been delayed by official engagements, which have necessitated my absence from the state for the last ten days. As you are aware, the act referred to fixed maximum freight rates upon grain, flour, lumber, salt, cement, live stock, agricultural implements, furniture and wagons. It became a law upon the 16th day of June, 1905, and immediately thereafter the eighteen railroads of the state instituted injunction suits in the United States Circuit Court for the Western Division of the State of Missouri, before John F. Philips, district judge, and without notice of hearing to the state, a temporary restraining order was granted. The question of the issuance of a temporary injunction was argued at length by Mr. Sanford B. Ladd, who was retained as special counsel for the state, Mr. Kennish and myself, and by a number of legal representatives of the railroads. After taking the matter under advisement, the court granted a temporary injunction as prayed for. Considerable delay then followed in the making up of the issues in the case, and it was not until the latter part of 1905 that the reply of the railroads to the answers that had been filed by the state, was finally secured, and the case ready to proceed to a hearing. The railroads sought to have the case heard by Judge Philips and not by a master, as has always been the custom in such litigation. This question was fully argued in February, 1906, before the court and, after some delay, a decision was rendered sustaining the contention of the state that the matter should be heard by a master, and Honorable Frank L. Schofield of Hannibal, was appointed by the court to hear the testimony, as special master, and report as to the law and the facts in such cases as the state and the railroads might agree upon for trial. An agreement was entered into by which three roads, the Burlington, Missouri Pacific and the Wabash, were selected as

those cases which would be tried first, these selections being, in my opinion, most advantageous to the state, as these roads are among, if not the best revenue producers in Missouri. Following the appointment of Judge Schofield, April 7th was set as the day that the taking of testimony would begin. At this time application was made by the railroads for a continuance for six months, that time being asked as necessary in which to complete the investigation of their books before beginning the introduction of testimony. This application was denied, and the master directed that the hearing of testimony begin on June 10, 1906. At that time, however, the examination of the books of the roads selected for trial, had not been completed, and the court granted a continuance until July 9th. The cases were again continued, in order to permit an examination of the books of account of the complainants, until September 7th, at which time the first hearing was begun in St. Louis. These hearings have proceeded, with occasional interruptions from time to time, up to the present, and the testimony in the Burlington and Wabash cases has now practically been completed. This is in brief, a statement of the various proceedings had in this litigation, and explains the present status therof.

From an investigation of similar litigation in other states, I find that these cases have proceeded as rapidly as such litigation usually proceeds. The natural delays incident to cases of this kind, in which a large number of lawyers and large interests are involved, have not been overlooked by the attorneys for the railroad companies, and though the railroad companies are the complainants, they have displayed no special desire to secure a speedy determination of the questions involved in this litigation.

In order that you may be further advised in reference to the facts developed in this litigation, I beg to submit the following: The rates fixed by the act of 1905 upon the commodities mentioned, were about a 30 per cent reduction of the rates which were then being charged by the railroads in this state, with the exception of the rate upon live stock, which was over 35 per cent less than the rate then in existence. Previous to the enactment of this law, the rates that were being charged by the railroad companies were in many instances below the maximum rates fixed by the board of railroad and warehouse commissioners in 1904, and much lower than the rates fixed by the last maximum rate law which was enacted in this state in 1875.

It is the contention of the railroads in this case that to comply with the law of 1905 would result in the confiscation of their property, and a violation of the Fourteenth Amendment to the Federal Constitution, in that to carry freight at the rates fixed in this law would not give a return above operating expenses. The rates, of course, apply only to intra-state freight, but it is frankly admitted

by the railroad companies that they would have no hesitation in complying with the provisions of this law were it not for the effect that these rates have upon interstate rates, in that it is a rule of railroad traffic that the interstate rate cannot be higher than the sum of the locals. It is not seriously contended by the railroad companies but that they would get a fair return upon that portion of their property which could be said to be used for the handling of intra-state freight by observing the rates in question, were the cost of carrying state freight the same proportionately as the cost of carrying interstate freight. It is, however, the contention of the railroad companies that the cost of carrying the average ton mile of intra-state freight is from three to seven times as large as the cost of carrying the average ton mile of interstate freight. So that the determination of this case practically turns upon the correctness of this contention. I am satisfied, from the facts developed in this litigation, that this contention is untenable, and that the rates fixed by the act of 1905 are, with the possible exception of the rate upon live stock, entirely reasonable. It is important at the outset to know that the rates the railroads have been charging the people of Missouri for the carrying of freight are from 25 to 35 per cent higher than they are in the neighboring state of Illinois and Iowa, notwithstanding the fact that the density of population in Missouri is practically the same as it is in the state of Illinois, and almost twice as large as it is in the state of Iowa. This is so whether the caculation is made on the basis of the population per square mile or on the population per railroad mile. It is a general rule in railroad operation that the density of traffic corresponds, in a general way, with the density of population.

In explanation of these rates which have been charged the people of Missouri, it is contended by the railroads that the distribution of population is not as even in Missouri as it is in Illinois and Iowa, and that the expense of railroad construction and operation is greater in Missouri than in either of the two states named. I am satisfied that these contentions are, in a measure, correct, insofar as a comparison is made betwen the entire state of Missouri with the states of Illinois and Iowa. However, it is my opinion that the conditions existing north of the Missouri river are more favorable to the railroad companies, both from the standpoint of density of traffic and also cost of construction and operation than the average conditions existing in the states of Iowa and Illinois. But, even conceding the correctness of the contention of the railroads in these regards, it would certainly not justify rates in this state being from 25 to 35 per cent higher than in the states referred to. The marked contrast existing in the topographical and industrial conditions in the north half as compared with the south half of Missouri, might well justify the legislature in vary-

ing the maximum rates which should be charged in the two sections of the state, or in authorizing the board of railroad and warehouse commissioners to regulate rates in reference to the difference in conditions affecting the expense and earnings in the operations of railroads.

The testimony taken in the Burlington case shows that in 1904, the Burlington railroad made upon that business, which it did in the state of Missouri, both state and interstate, a net profit of $5,273,817.84, and in 1905, it made a net profit on its Missouri business of $4,857,384.23. These figures show the net profits, after paying all operating expenses, taxes, and the setting aside of a considerable amount for the purpose of improvements and betterments. The profits in each of these years would pay a 20 per cent dividend upon a reasonable valuation of the actual physical property of the road in the state of Missouri. That is, according to the rate of profit enjoyed by the Burlington on the business that it did on its road in this state in the years 1904-5, it could pay for its system in Missouri in five years. In 1904 the average net earnings per mile of the Burlington railroad on its entire system was $2,347, while the net earnings per mile in that year upon the part of the road which is located in the state of Missouri was $5,-110.19. In 1905, the average net earnings per mile upon the entire system was $2,534.57, and the average net earnings per mile upon that portion of the road in the State of Missouri was $4,-253.41. Although less than 11 per cent of the mileage of the Burlington railroad is located in the state of Missouri, that mileage furnishes to the road over 20 per cent of its entire revenue. These figures are readily explained by a comparison of the freight rates fixed by the board of railroad and warehouse commissioners in 1904, which have generally been the rates charged by the railroads on mileage tariffs, and those in existence in Iowa and Illinois by order of the board of railroad and warehouse commissioners of those states; I cite you the following instances:

In Missouri, the maximum rate for carrying a car load of wheat 100 miles to market is $60; in Iowa and Illinois, for the same car the same distance, it would cost $48. In Missouri, the maximum rate for carrying a car of stock 100 miles to market is $24; in Illinois the same car the same distance can be carried for $20. In Missouri, the maximum rate for a car of agricultural implements 100 miles is $34; in Iowa, the maximum rate for the same car the same distance is $18; in Missouri, the maximum rate for a car of lumber is $32; in Iowa $25. A corresponding difference exists upon other commodities, for other distances according to the schedule adopted by the railroad board in 1904, and the rates existing in the two states mentioned. The act of 1905 serves to equalize, in a general way, this marked disparity in rates.

Upon the intra-state business alone, the Burlington railroad would in 1904, had the rates fixed by the Act of 1905 been enforced, have enjoyed a net profit of $511,343.03, and in 1905 a net profit of $647,501.66. Apportioning the property of the road between intra-state and interstate business, according to the volumes of the two traffics, and calculating the expense of the two kinds of traffics upon the same relative basis of cost, said profits in 1904 would have paid a 17.39 per cent dividend upon the investment, and in 1905, a 19.20 per cent dividend upon the investment. It is readily apparent, therefore, that unless the contention of the railroads, that it cost from three to seven times as much to carry the average ton mile intra-state freight, as it does to carry the average ton mile of interstate freight, can be sustained, these cases must hesult in a decision against the railroads. To support their contention in this regard, the railroads have offered a large amount of expert testimony, although it is apparent from the evidence taken that this question is one which is capable of reasonably accurate mathematical computation. From an investigation made by the experts employed by the state, it is apparent that the revenue per ton mile on intra-state freight, is from two to five times higher than the revenue per ton mile on interstate freight, and that the profits in the state of Missouri enjoyed by the railroads from handling of intra-state freight, have been larger than the profits derived from the handling of interstate freight. In other words, more money proportionately has been made in the doing of state business, than has been made by the doings of interstate business. Further investigation and calculations from actual waybills is now in progress, which, it is believed, will demonstrate the correctness of this contention.

In the section of the act of 1905, fixing the maximum rates heretofore referred to, it is provided, that they shall be binding upon any person, corporation or partnership, engaged in the operation of any railroad. The penalty clause which provided for a penalty and forfeiture, applies only to corporations. This difference between the two sections, Judge Philips, declared in his opinion, rendered at the time of the granting of the temporary injunction, would render the act unconstitutional. While I do not agree with the correctness of this opinion, I think that this fact, together with other facts, to which I will refer, makes it advisable that further legislation in reference to this matter should be enacted by the next legislature.

As already stated, the rate fixed by the act of 1905, for the carrying of live stock, was over a 35 per cent reduction of the rates theretofore existing, and established a rate lower than in any contiguous state. It also fixed the rate lower for live stock than for a number of other articles of freight traffic of much less value,

and on which the loss and risk incident to transportation is much less. This reduction on the live stock rate was added to the bill by an amendment adopted by the senate, which body also eliminated, by amendment the rate upon class J. which includes coal, brick, sand, railroad ties and other fourth-class articles.

It is therefore, my opinion that there should be adopted by this legislature a new maximum freight rate law which would make such changes in the live stock rate of the act of 1905, as would relieve the bill from any question of legality on account of the low rate upon live stock fixed by the act of 1905; that the penalty clause of the bill should be changed; that maximum rates should be established upon the articles enumerated in class J., and that such modifications should be made in the rates fixed by the act of 1905, upon those commodities, other than live stock, which might in the opinion of the legislature, assisted by the experts employed by the state in this litigation, seem advisable. The enactment of a law making these changes in the act of 1905, *would not affect the litigation now pending*, unless the railroad companies would by reason of such new enactment decide to abandon the litigation. I am also of the opinion that it would be advisable for the legislature to adopt a different classification of all articles of freight than that made in the act of 1875, which is incomplete and does not correspond with the existing classifications of the board of railroad and warehouse commissioners, the Interstate Commerce Commission, or of the railroads themselves. It would be well that all of these classifications should correspond, so far as injustice would not be accomplished thereby to any special class of shippers. I understand that some of the railroad companies are opposed to the enactment of a law amending the act of 1905. But the fact that the railroads do not want to have such a bill enacted, is certainly no reason why the legislature should not enact it. In addition to the questions existing in the litigation by reason of the conflict in testimony as to the correctness of the contention of increased cost of handling intra-state as compared with interstate freight, the railroads would, of course, desire to have remain in the litigation the questions in their favor created by the inequalities in the penalty clause and the rate upon live stock as compared with the rates fixed upon the other commodities therein named.

In addition to the results to be accomplished by further legislation in this direction, *there should be adopted, if practicable, a plan by which a determination of this question can, in the first instance, be kept in the courts of the state of Missouri, and if such a result is possible, it should be accomplished.* While I do

not mean to be understood as saying that the federal courts would be unfair to the state, yet I do say that if the state of Missouri is a good enough place for the railroads to do business and to make money in, the courts of Missouri are good enough courts in which to litigate the question of the reasonableness of rate regulation adopted by the legislature of the state. And I am satisfied that, at least, a more speedy determination of this question can be had in the state than in the federal courts. If such a law could be enacted, the railroads would, of course, retain their right of appeal to the Supreme Court of the United States upon the question as to whether the rates established were in conflict with the fourteenth amendment to the federal constitution.

In conclusion, I desire to say that while the delay incident to these proceedings, from various causes, has been unsatisfactory, yet it must be remembered that such has been the experience of other states that have undertaken a contest for the securing of reasonable railroad freight rates. Particularly when it is considered that the railroads have for years fixed their rates for the carrying of freight in this state practically without let or hindrance, it is not surprising that they should resist in every way possible any effort by the state to deprive them of this privilege. At the beginning of this litigation, there was no person connected with official affairs in the state of Missouri, who was in possession of any actual information concerning the questions involved in this litigation. The work of preparation has consequently necessarily been burdensome and required time. In view, however, of the fact that we now know in a definite way something of the earnings and expenses incident to the railroad business in the state of Missouri, we have a definite working basis upon which to prosecute further efforts for the securing of reasonable freight rates to the people of this state. The history of these contests in other states is that they are not won except after years of effort and then only when the railroads are convinced that the representatives of the state cannot be defeated or discouraged either by delays or unsatisfactory results.

In fairness to the railroads, I desire, however, to say that the representatives of a number of the roads have expressed to me a willingness to make concessions in the matter of railroad freight rates and to co-operate with the representatives of the legislature and of other departments of the state government in devising a new bill which will secure substantial reductions to the people of the state and relieve the railroads from some of the burdens which they claim are imposed by the acts of 1905. I have at all times expressed my willingness to join in this effort, and I have directed the firm of Haskins & Sells, which has represented the state as

expert accountants in this litigation, to give special attention to the reasonableness of the rates adopted on each of the separate classifications in the Act of 1905, and also as to what would be a reasonble rate upon those articles classified under class J., in order that the legislature might have the benefit of their investigation, in case it should deem it advisable to undertake the enactment of a new maximum freight rate law, for the purpose of making mutual concessions in order to avoid the uncertainties and delay incident to further litigation.

Respectfully submitted,

(Signed.) HERBERT S. HADLEY,
Attorney-General.

APPENDIX 10.

STATE OF NEW YORK

EXECUTIVE CHAMBER.

Albany, June 11, 1907.

To The Assembly:

I return herewith, without my approval, Assembly Bill No. 2269, entitled "An Act to amend the railroad law, in relation to rates of fare."

This bill, with specified exceptions, provides for a maximum passenger fare of two cents per mile upon the railroads in this state. Steam railroads less than 150 miles in length which are not within the counties of New York and Kings (or within the limits of an incorporated city), are permitted a higher maximum charge of three, four and five cents a mile according to length of line, unless through consolidation, lease or control they form part of a system whose combined lines exceed 150 miles, in which case the provision for a maximum rate of two cents a mile is applicable.

The passage of the bill was not preceded by legislative investigation or suitable inquiry under the authority of the state. Nor is the fixing of this rate predicated on reports or statistics officially collated which would permit a fair conclusion as to the justice of its operation with reference to the railroads within its purview. It plainly reflects dissatisfaction with existing conditions and an effort to provide a remedy through arbitrary action. It seems largely to have been the result of annoying requirements and discriminations in connection with the sale of mileage books on certain roads.

The bill represents a policy seriously mistaken and pregnant with disaster. It is of the utmost importance that the management of our railroad corporations should be subject to strict supervision by the state and that regulations compelling the observance of the law and proper and adequate service should be rigidly enforced. It is the duty of these corporations to provide transportation of passengers and goods at reasonable rates, and the state should compel the performance of this obligation.

But injustice on the part of railroad corporations toward the public does not justify injustice on the part of the state toward the railroad corporations. The action of government should be fair and impartial, and upon this every citizen, whatever his interest, is entitled to insist. We shall make matters not better but worse if to cure one wrong we establish another. The fact that those in control of railroad corporations have been guilty of grossly improper financiering and of illegal and injurious discriminations in charges points clearly to the necessity of effective state action, but does not require or warrant arbitrary reprisals. In dealing with these questions democracy must demonstrate its capacity to act upon deliberation and to deal justly.

It is of the greatest importance not only that railroad corporations should be compelled to respect their public obligations but also that they should be permitted to operate under conditions which will give a fair return for their service. Upon this depends not simply the security of investors, but the security of their employes and the protection of every form of industry and commerce through the maintenance and extension of necessary transportation facilities. Nothing could be more opposed to the interests of the community as a whole than to cripple transportation corporations by arbitrary reduction of earnings. It may be said that a two-cent passenger rate is not so extreme as to have a very injurious result. But this is a debatable question. Large and prosperous suburban communities have been built up through the offer of commutation rates much less than the proposed maximum. Upon the maintenance of these rates many thousands of our citizens rely. Considerable differences exist between the railroad corporations with respect to the territory they serve and the cost of service, and it is manifest that what would be fair for one might be far from fair for another. An arbitrary dislocation of tariffs by the fiat of the legislature without investigation is a matter of serious concern. The best that could be said for such legislation would be that it should be regarded as an isolated case and not as a precedent. For if flat freight rates, either for all commodities or for different kinds of commodities, were similarly to be fixed by the legislature without investigation or proper ascertainment of their justice, our railroad business and our industrial and commercial interests would be thrown into confusion.

I do not mean to be understood as saying that a maximum two-cent passenger rate would be unreasonably low. It might be high enough in many cases. Possibly it would be high enough in all cases. I fully appreciate the fact that those who have promoted this bill believe that such a rate would be fair. But I deem

it most important that the policy of dealing with matters of this sort arbitrarily, by legislative rule of general application without reference to the demands of justice in particular cases, should be condemned. Every workingman, every tradesman, and every citizen believing himself to have aught at stake in the prosperity of the country, should determinedly oppose it. For it not only threatens the stability of business enterprises which makes our prosperity possible, but it substitutes unreason for sound judgment, the ill-considered demands of resentment for the spirit of fair play, and makes impossible patient and honorable effort to correct abuses.

There is a better way. It has already been pointed out in the legislation of this state. It is practically impossible in view of the nature of the problems and the many questions requiring consideration, for the legislature to deal directly with railroad rates in a satisfactory manner. Where a matter requires investigation in order that a just result may be reached, the obvious course is to create a body which can investigate, with expert assistance, as summarily as possible, and which shall have adequate power to make appropriate orders. Such a body has been created in this state through the Public Service Commissions law recently enacted.

Provision is made for inquiry into matters of freight rates and passenger fares, and for the fixing of such rates as shall be found just and reasonable. If a passenger rate of two cents a mile is just and reasonable, it can be fixed. If it is not just and reasonable, it should not be fixed.

It will be said that this requires time and investigation. But it will not require any longer time or any more protracted investigation than are necessary to reach a right result. The interests of of the country are so great and our individual interests are so closely interwoven that it is to the highest degree dangerous to give encouragement to the spirit of impatience with the orderly processes of inquiry.

It may also be said that many other states have adopted similar legislation. If the principle of the legislation be sound we could readily follow the precedent; but if it be unsound there is the greater reason why it should not be followed. The state of New York has provided machinery to settle these questions justly to all with as much despatch as possible. It is to the interest of all that this machinery should be made as perfect and efficient as possible. It is to the interest of none that it should be discarded because of preference for arbitrary legislative action.

If this bill were to become a law it would most probably lead in many cases,—on account of pretended or real necessity,— to economies in service and to readjustment of rates now lower, to the annoyance and injury of considerable numbers of the traveling

public for which the gain to others would not necessarily compensate. Again, the validity of such a statute would almost certainly be contested in protracted litigation, the result of which, to say the least, would be in doubt. At a critical time when the interests of all demand that reason and judgment should control in dealing with such matters, we should have abandoned our true line of action and facilitated still wider departures.

I therefore disapprove this bill.

(Signed) CHARLES E. HUGHES.

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MISSOURI RATE CASES.

Office Supreme Court, U. S.
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Appeals Nos. 130, 672-704 (even numbers) and Cross Appeals No. 134 and Nos. 673-705 (odd numbers) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

BRIEF FOR ALL RAILROADS, APPELLEES AND CROSS-APPELLANTS

GARDINER LATHROP

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

October Term, 1911.

130	Knott et al. v. C., R. & Q. R. Co.	MISSOURI RATE CASES.
134	C., R. & Q. R. Co. v. Knott et al.	
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STATEMENT.

The Missouri Railway Companies, affected by the statutes in controversy, traverse the State from east to west and from north to south, making an extensive network of railroads covering almost every section.

Most of the lines are system lines, many of them of such large extent as to make them important highways of commerce from Chicago and St. Louis to the Pacific Ocean and the Gulf of Mexico, and, with their connections, they transport traffic originating not only in all parts of the United States but also in all parts of the world.

Their trains, local or through, are used indiscriminately in handling interstate and intrastate traffic.

In the early history of railroad transportation, the railway companies and their traffic were local, and all commerce thereover was purely intrastate.

In the progress of time, these local roads, under authority of law, extended into adjoining States, and, later, were consolidated into great systems extending, in some cases with a single connecting line, across the continent from east to west and from north to south.

With the growth and extension and consolidation of the railroads, the matter of rate making ceased to be a matter of purely local concern, confined within the borders of a single State, and became a complex problem, obliterating state lines, and solved, largely, with reference to trade conditions, competition of water, markets and rival carriers.

As the railroad rate fabric of the country was building, waterways constituted a barrier to through rates, systematically graded up. This was caused in part by water competition, either actual or potential, and also by the fact that before the era of railway bridges, the railroad contract of carriage ended when the waterways were reached.

These facts led to a peculiar phase of the rate problem in so far as the State of Missouri is concerned. The Mississippi river forms the eastern boundary of the State, and the Missouri river substantially, for rate purposes, the western boundary.

The flow of commerce over the railroads from east to west first stopped at the Mississippi river, where traffic was either distributed by water, or continued its land journey westward after being ferried across the river. Hence, railroad rates, many years ago, were made from the east up to the Mississippi river. The further land journey of the traffic was made by the Missouri railroads across the State until the Missouri river was reached, where the traffic was either distributed by water or continued its further journey westward by rail.

The Mississippi river thus became the basing point for all traffic from the east, either reaching destination there or going westward, and the short line haul rate across the State carried the traffic to the Missouri river. As the country developed still further westward, the Missouri river became another basing point, with the short line haul rate between the two rivers constituting one factor in the interstate rate for traffic moving either west or east. This scheme of rate making originating, naturally, in the first instance, many years ago, by reason of the location of the two great waterways, continued without interruption after the building of bridges and the consolidation of lines, and became a part of the permanent rate system of the country, resulting in the building up of great trade centers at different points

along these two rivers on different sides of the state line, with large investments of capital, both of private citizens and business corporations, and of the railway companies themselves in the way of expensive terminals, shops and other improvements.

During the examination of Mr. James Peabody, statistician for The Atchison, Topeka and Santa Fe Railway Company, the following colloquy occurred (Rec., 4413):

> "The Court: Why must the rates be arbitrarily fixed on the basis of Missouri rates?
>
> A. That is a question I could not answer, Judge. It has been found in the course of building up transportation business, that basing points are necessary to the equitable conduct of it. So that by whatever route you travel going through these basing points, they will all take the same rates. Consequently, Chicago, the Missouri river and the Mississippi river have been used for years as basing points.
>
> Q. I understand. I understood from Mr. Lathrop when he was here a month ago, explaining the railroad's side of it, why 30 or 40 or 50 years ago, when these rivers were an important practical factor in rates, both passenger and freight, that they should have been taken as basing points. And I can understand the contention of the railroads that having thus been fixed for many years, at a time when the rivers were a practical factor, in the meantime building up large interests in property and terminals, and business men locating warehouses, etc., and so on at these points—I see the force of that argument.
>
> Mr. Hagerman: You wouldn't have any Kansas City if that were not true.
>
> The Court: Now you will get into an argument. I do not say whether it is sound or unsound. But aside from those arguments, of

which I see the force, but whether they are controlling or not is a matter to be considered later, I do not see now, and never have been able to see (although I have never studied the question) why the Missouri river particularly should any longer be a controlling influence. I can see more clearly why the Mississippi river should be. But you and I and every other man of observation knows that there haven't been three boats on the Missouri river in 30 years.

Mr. Hagerman: Yet the river stands there as a menace. It stands there ready to be used."

That not only the Mississippi river but the Missouri river also is and will continue to be a controlling influence in the matter of rates "as long as the river remains navigable to its present capacity," is judicially asserted under the doctrine of *Interstate Commerce Commission* v. *Alabama Midland Railway*, 168 U. S., 144, 171.

Besides, the President of the United States has by special message to Congress on the 21st day of December, 1911, recommended the appropriation of two millions of dollars per year for the improvement of the Missouri river from Kansas City to St. Louis, as a part of the great waterways scheme now commanding the attention of the general government. We quote the following paragraph from the message:

"Rivers and Harbors.

The estimates for the river and harbor improvements reach $32,000,000 for the coming year. I wish to urge that whenever a project has been adopted by Congress as one to be completed, the more money which can be economically expended in its construction in each year the greater the ultimate economy. This has especial application to the improvement of the Mississippi river and its large branches.

It seems to me that an increase in the amount of money now being annually expended in the improvement of the Ohio river which has been formally adopted by Congress would be in the interest of the public. A similar change ought to be made during the present Congress in the amount to be appropriated for the Missouri river. The engineers say that the cost of the improvement of the Missouri river from Kansas City to St. Louis, in order to secure 6 feet as a permanent channel, will reach $20,000,000. There have been at least three recommendations from the Chief of Engineers that if the improvement be adopted $2,000,000 should be expended upon it annually. This particular improvement is especially entitled to the attention of Congress, because *a company has been organized in Kansas City, with a capital of $1,000,000, which has built steamers and barges, and is actually using the river for transportation in order to show what can be done in the way of affecting rates between Kansas City and St. Louis,* and in order to manifest their good faith and confidence in respect of the improvement. I urgently recommend that the appropriation for this improvement be increased from $600,000, as recommended now in the completion of a contract, to $2,000,000 annually, so that the work may be done in 10 years." (Cong. Rec., pp. 614-5.)

The wisdom of continuing the Mississippi river and Missouri river as basing lines was distinctly recognized and approved by the Interstate Commerce Commission in the so-called Burnham-Hanna-Munger case.

See

Interstate Comm. Com. v. *Chi., R. I. & Pac. Ry.*, 218 U. S., 88, 107.

The facts found by the court below on the issue of the direct and necessary effect of the state-made rates upon interstate rates are as follows: (Finding 3, Rec., 5306, 5307):

> "Both from a geographical and railway standpoint Missouri is situated differently from the other States of the Union, there only being two or three other States that have a resemblance to it in these particulars, and each of them in a lesser degree. This is so because the Mississippi is its boundary on the east all the distance. From a railroad standpoint the Missouri river is its boundary line on the west, although physically the Missouri river is only the western boundary line from the northwest corner of the State about half way to the southwest corner. But at the half way point, namely, Kansas City, the river turns directly to the east, and continues its way to the Mississippi river. In its production, business and commerce all that part of Missouri to the north of the Missouri river is practically like the south half of Iowa, the country districts producing large quantities of live stock and grain for the market as well as much bituminous coal. The south half of Missouri is entirely different. The amount of grain and live stock is much less than in the north half of the State. But the south half has a large amount of timber, stone, lime, lead, zinc, iron, and fruits. St. Louis on the east is a city of nearly a million people, Kansas City on the west nearly half as many, while St. Joseph has more than one hundred and twenty-five thousand people. These three cities carry on large manufacturing interests. The grain, live stock and packing house interests at Kansas City and St. Joseph are enormous. For a third of a century or more for reasons which need not be repeated, rates from the east were fixed to the Mississippi river, and later on, from thence to the Missouri river.

The interstate rates either in or out were the one plus the other. It was the same from the west. It was likewise the same for the transstate business going in either direction. Such is the method existing today. This brought about the fact which for years has existed and exists today, that the short line of road between the two rivers fixes the freight rates. To illustrate, the Burlington road is the short line between the rivers, being 198 miles from Hannibal to St. Joseph, and the same distance, within a few miles, to Kansas City. The roads between Kansas City and St. Louis, and there are four at least of them, including the Burlington, are an average distance of nearly 300 miles, but some of the roads being fifty miles or more farther between the points than the others. This brings about the fact that all freight rates between any one point on the one river and any point on the other river are the same as the rate from Hannibal to St. Joseph over the Burlington line. That is to say, the freight rates on any road regardless of distance are the same between St. Louis and either Kansas City or St. Joseph that they are between Hannibal and St. Joseph over the Burlington line. This has given the three cities of St. Louis, Kansas City, and St. Joseph great advantages over other points. Competent persons say that to change this system will work irreparable harm to the three cities named, as well as to all other places within the State, by driving both the jobbing and manufacturing business to seaboard points. As to this no finding is made nor opinion expressed because it is believed to be a matter of policy upon which this court in these cases should express no opinion. As to the passenger rates, by reason of competition the fare is the same between Kansas City and St. Louis, the shorter line fixing the rates, thereby compelling the longer road to be at much ex-

pense without remuneration. This is likewise true as to all competitive points. As to the foregoing question of rates and fares, there is no United States statute governing the same, and there is no Missouri statute upon the subject except the two statutes questioned by the bills, one dealing with certain commodities per car per distance, and the other fixing the passenger fares at two cents. Aside from these two statutes, and as to any bearing they have as to charges between the two rivers, the conditions named have been brought about and exist today by reason of a long time custom and by reason of transportation, actual and probable, upon the two rivers. Still further bearing on the question are the following facts: Joplin is a city in the southwestern part of the state of more than twenty-five thousand people. There are a number of towns adjacent thereto, giving that county (Jasper) a population of 200,000 people. It is a very large mining district of lead and zinc. Between Kansas City and Joplin three of complainants herein have railroads. The Missouri Pacific at all points between the said places is within the State. Each of the other two between said points is partly without the State, starting within and going out and coming back, thereby making it interstate business as to two of the roads between Kansas City and the Joplin district. Between Kansas City and St. Joseph, four roads do the business. The Missouri Pacific and Chicago Great Western is each part of the distance within the State of Kansas, while the Burlington and St. Joseph & Grand Island Company is each wholly within the State of Missouri between the two cities. Between St. Joseph and St. Louis two of complainants do practically all the business, which is very large in both passenger and freight. These are the Burlington and Missouri Pacific. Between said cities the Burlington line is wholly within the State.

> But the Missouri Pacific line is partly within the State of Kansas, crossing the Missouri river at Atchison and coming back into the State at Kansas City. On the foregoing facts the finding is that the short line between two competitive points necessarily fixes the rate, and the Missouri statutory rates under the statutes in question fix the rates between the cities named. But this is so solely because of the geographical location of cities and railroads, and competition, and long time custom. It is not so either because of a statute or any judicial determination by any of the courts of Missouri."

Likewise, in his opinion, in deciding the cases, Judge McPherson concedes the necessary interference of the rates prescribed by the state statutes in controversy with interstate commerce as a matter of fact.

His opinion upon this question as to the facts is as follows (Rec., 5288):

> "Upon their face the statutes in question are with reference only to state commerce. But it is urged that they are void because in effect they directly have to do with interstate commerce. The facts are as follows:
>
> 'Between Kansas City and the Joplin mining district there are three lines of railway. The Missouri Pacific between these points is wholly within the State, and the other two, partly within and partly without the State, and therefore between the two Missouri cities of Kansas City and Joplin, are doing an interstate business under the decision of *Hanley* v. *R. R.* (187 U. S., 617.) The same situation exists between the cities of St. Joseph and Kansas City, two of the roads being wholly within the State between the two points, and two partly within and partly without.
>
> And between the cities of St. Joseph and St.

Louis such situation is emphasized, the Burlington road being wholly within the State between the two cities, and the Missouri Pacific a part of the distance being within the State of Kansas. The facts are that when the Missouri statutes lowered the passenger rates on the roads wholly within the State between said points, the interstate roads between said points were compelled by competition to lower their rates to correspond with the state rates thus fixed by statute. By reason thereof the argument is that the Missouri statutory rates control the interstate rates between the cities named, and therefore are void as being in conflict with the commerce clause of the national Constitution.

During the period of railroad building, for a time the western termini were at the Mississippi river. By reason thereof, and by reason of competition on account of river transportation, the railways fixed rates from the east to that river. After a time roads were completed to the Missouri river. Rates to points on that river were fixed on rates to the Mississippi river, plus rates between the two rivers. And for thirty years or more rates have been thus fixed. And as the Missouri statutes lower the rates between the two rivers, the argument is that the statutes lower the interstate rates from the east to Missouri river points, and to points to the west.' "

The facts in the record showing how the Missouri statutory rates directly affect interstate commerce are outlined in the paper of the late Robert Mather, Exhibit 4 in the Frisco case (Rec., 4806, 4820), and in the undisputed evidence of C. Haile (Frisco Case, Rec., 4035, 4076), George H. Crosby (Burlington Case, Rec., 555-558, 578-604, 846-847), Darius Miller (Id., 605-618), W. C. Stith (Missouri Pacific Case,

Rec., 1543, 1770-1773), A. D. Bethard, (Rec., 4078-4098), J. W. Kendrick (Rec., 4390-4403), James Peabody (Rec., 4411-4413), and C. L. Stone (Rec., 4481-2).

The railroad maps (Rec., 2365-4897) show the location of the border cities and the report of the board of equalization (Rec., 5190-5224) shows the points from and to which the Missouri railroads run.

The late Robert Mather, in a paper the statements contained in which were adopted as his views by C. Haile, vice president of The Missouri, Kansas & Texas Railway Company in his testimony, (Rec., 4043) says (Rec., 4806-9):

> "The great movements of traffic in this country are eastward and westward. The volume of the westward movement has always been high class merchandise,—dry goods, wearing apparel, groceries, hardware, and like articles. Formerly this was all produced in the east or imported through Atlantic ports; it is only within recent years that the larger cities in the west have become manufacturing centers.
>
> When the evolution of our rate fabric began New York, Boston, Philadelphia and Baltimore were the bases of supply. Chicago, St. Louis, St. Paul, Omaha, and Kansas City owe their development as trade centers primarily to strategic location at the head of navigation, or at points where the transcontinental trails left the water courses for the west, northwest, and southwest. They commenced as outfitting points for prospectors and settlers; their business was that of distributing through the new western country the articles of commerce manufactured in or imported through the east; and that still constitutes a large part of their trade.

When railroads found their way to Chicago and St. Louis their rates were fixed largely by the water competition which met them on their arrival. Gradually railroads were constructed westward from these points and, as they reached common territory, the force of competition began to be felt. Intense rivalry developed between the distributing houses of Chicago and St. Louis, and pressure was brought to bear upon the railroads, both east and west, to keep the rate fabric so adjusted that goods, stored in and distributed from either city, might be laid down at any of the Missouri river points at substantially the same freight cost. The class rates from New York to Chicago thus became the basis of measurement for all class rates. The St. Louis rate was a fixed per cent. higher, approximating the difference in the cost of reaching that point by water. The rates between the Mississippi river and Chicago on the one hand and the Missouri river on the other were fixed not at what would be a reasonable rate for the distance, but at what it was necessary to maintain in order that St. Louis and the lines leading through St. Louis might compete with Chicago for the expanding business of Kansas City, Atchison, St. Joseph and Omaha.

In the territory west of the Missouri river the same process has been repeated, and rates are maintained in such relation not only that Kansas City, St. Joseph and Omaha may compete with each other, but that goods distributed from St. Louis and Chicago, as well as from the eastern cities, may be handled through either Kansas City, St. Joseph or Omaha and laid down at the several consuming points at practically the same freight cost. In the northwest this same competitive adjustment is maintained between Chicago, Duluth, Minneapolis and St. Paul. In the southwest, Chicago, St.

Louis and Kansas City must be kept on an even keel, and when Texas is reached, the whole adjustment is modified to meet the competition of coastwise steamers plying from New York to Galveston. To Colorado and Utah, the routes through all these gateways are kept in constant adjustment, and the rate so arranged that Denver and Pueblo are enabled to do a distributing business.

What is true of westbound merchandise is equally true of the movement to the east of the great staples raised in the west. The grain territory is so divided and rates are so made that grain may move freely to the Mississippi river, the lakes and the gulf, through the great storage centers of Minneapolis, Duluth, Chicago, St. Louis, Omaha and Kansas City. In like manner live stock rates are so arranged that the traffic may move freely to the rival packing centers of Kansas City, St. Joseph, Omaha, St. Paul, Chicago and St. Louis.

These rate relations are not the work of the traffic departments of the railroads. They do not exist by virtue of acts of legislatures or of orders of commissions. They are the resultants of the commercial growth of the country. Trade is established along these lines; industries and communities are founded on the basis of these adjustments, and their existence and prosperity depend upon the continuance of these rate relations. They are the controlling facts in all rate disputes—more stubborn than distance and as immovable as mountains.

There is hardly a rate on any article of commerce but feels the force of these competitive conditions. They absolutely dictate the traffic policy of the railroads operating in the territory affected by them. The carrier makes no rates that are not effectively moulded by these conditions, and the rate-making power of the Interstate Commerce Commission itself cannot ig-

nore them. *The only rate-regulating body that makes rates without reference to these commercial conditions is the legislature or the railroad commission of a single State. Its field of operations includes but a fraction of the territory whose traffic is controlled by these conditions; contains but few of the larger distributing centers which compete for that traffic; and is usually circumscribed, either wholly or in part, by imaginary boundaries fixed without regard to factors which exercise controlling influence upon the trend of traffic and of rates. The influence of lakes, of rivers and canals, the competition of rival markets, the relation between manufacturer and dealer, and other like forces that, in the making of rates, confront the traffic officer of an interstate railroad and the Interstate Commerce Commission itself, enter but slightly, if at all, into the calculations of the State. In every case, in the exercise of its rate-making power, distance is the one factor given serious consideration; and the result of its labors is invariably the production of a distance tariff.*

* * * * *

But when the traffic officer of an interstate railroad comes to apply this state distance tariff, made for state use on purely local considerations, to the traffic that actually moves over his rails, he finds that he cannot confine its influence to traffic within the State, and that, against his will and without his action, it readjusts his rates into and out of and through the State, and determines his revenue on traffic that never traverses the borders of the State.

Missouri has a far reaching control over interstate rates by reason of the situation of the State at the point of least distance between the Mississippi river—the basing line for rates from the east—and the Missouri river, the base line for rates to the west.

There are three factors which go to make up

the rates from the east to the western territory —whether or not they are published as through rates—namely, the rate from the seaboard to the Mississippi river or Chicago; the rate from the latter base line to the Missouri river; and the rate west of the Missouri river. Reduce the rate between the Mississippi river and the Missouri river and you reduce the rates on all business either locally or through or beyond these base lines.

The first class rate between the Mississippi and Missouri rivers practically determines the interstate rates on all classified articles moving between the east and west. It is at present 60 cents per 100 pounds, this being the figure fixed by the Missouri railroad and warehouse commission as a reasonable maximum rate for the short line haul of approximately 200 miles across the State from the Mississippi to the Missouri—the distance from Hannibal to St. Joseph being 196 miles, and from Hannibal to Kansas City, 199 miles.

Though this rate is based on the distance of 200 miles, competitive conditions outside the State apply it at once to all hauls across the State, no matter what their distance. The short line from St. Louis to St. Joseph is 302 miles, and lines operating between those cities would be privileged, under the commission's maximum scale, to charge 74 cents, first class. The short line between St. Louis and Kansas City is 277 miles, for which distance the commission's scale is 71 cents, first class. But here considerations enter which are entirely outside the horizon of the Missouri commission. *The rates from New York to Hannibal and St. Louis are the same. There are routes leading from New York to St. Joseph and Kansas City, through both Hannibal and St. Louis. Kansas City and St. Joseph compete in the same trade territory, and the rates to both points from New York must be kept the same through all gateways.*

Consequently the commission's maximum rate for the shortest distance becomes the rate between all four crossings."

Again Mr. Mather says (Rec., 4810-12):

"The effect within the State of Missouri, however, is only the beginning. The rate between the Mississippi and Missouri rivers being, as previously explained, one of three factors of a through adjustment from points of production in the east; the rates from the east to all Mississippi river crossings being the same; there being competitive routes from the east to all Missouri river points passing through all of these Mississippi river crossings; and the merchants and manufacturers in the Mississippi river cities maintaining trade relations with all of the Missouri river cities and with the territory reached through them; it follows that the rate between Dubuque, Ia., and Kansas City, Mo., cannot be higher than the rate between Dubuque and Council Bluffs (both points within the State of Iowa); nor can the rate between St. Louis, Mo., and Omaha, Neb., be higher than the rate between St. Louis and Kansas City or between St. Louis and St. Joseph (movements wholly within the State of Missouri).

* * * * *

Not only this, but this Missouri commission rate for 200 miles fixes the maximum rate which the Missouri Pacific Railway may charge for its haul of 488 miles between St. Louis and Omaha through Missouri, Kansas and Nebraska; and in like manner the rate of the Illinois Central Railroad for its haul of 703 miles between the same points, through the States of Missouri, Illinois and Iowa."

Hence, any change of rates made by Missouri state authority not only affects the comparatively small amount of local traffic involved but the large amount of interstate traffic also.

I.

INTERDEPENDENCE OF STATE AND INTERSTATE RATES.

In the first place, note the location of the cities on the eastern and western border of Missouri.

On the eastern border, with the Mississippi river between, are St. Louis, Missouri, and East St. Louis, Illinois, Hannibal, Missouri, and a few miles up and across the river, Quincy, Illinois. On the western border, with the Missouri river between, are St. Joseph, Missouri, and Atchison and Leavenworth, Kansas, and, further down, are Kansas City, Missouri, and Kansas City, Kansas, divided partly by a line and partly by a street, and actually running into each other, without even a river between them. The situation as to the two Kansas Citys is such that the Kansas City Stock Yards, where the immense traffic in live stock is transacted, have the state line running through them, one part being in Missouri and the other in Kansas. (Rec., 1416-18 and map).

Rates from East St. Louis and Quincy not only to Kansas City and St. Joseph but also to Kansas City, Kansas, Leavenworth and Atchison, are the same as from St. Louis and Hannibal to Kansas City and St. Joseph, all in the State of Missouri, and any changes in the rates between those four Missouri cities, prescribed by state authority, must be immediately met by East St. Louis and Quincy, or their business will be transferred to St. Louis and Hannibal. Hence, the Missouri state rates directly interfere with and control the interstate commerce between East St. Louis and Quincy and the western

border cities on either side of the state line and directly affect the revenues of the carriers engaged in the transportation thereof.

The same result would follow as to commerce between St. Louis and Hannibal, Missouri, and Atchison, Leavenworth and Kansas City, Kansas, all interstate. The Missouri state rates would be absolutely controlling and would have to be met.

Map No. 1, of the book of Maps accompanying this brief, graphically illustrates the interdependence of state and interstate rates across the State of Missouri, shows the population of the cities concerned under the census of 1910, and the relative proportion of state and interstate traffic, both freight and passenger, compiled from the record, as follows:

FREIGHT	Intrastate	19.33%
	Interstate	80.67%
PASSENGER	Intrastate	45.23%
	Interstate	54.77%

Hence it follows that the state-made freight rates directed against 19.33% of the traffic directly affect and control the remaining 80.67%, which is interstate traffic, and the state-made passenger rates directed against 45.23% of the traffic directly affect and control the remaining 54.77%, which is interstate traffic.

II.

CONTROL OF MISSOURI STATE RATES OVER TRAFFIC FROM CHICAGO TO MISSOURI RIVER POINTS.

For many years the Chicago rates to Missouri river points have been made by adding the following fixed differentials to the rates from the Mississippi river to the same points, viz:

Class	1	2	3	4	5	A	B	C	D	E
Cents per 100 lbs.	20	20	10	5	5	7½	7½	5	5	5

See Appendix G, Sixteenth Annual Report of the Interstate Commerce Commission, pp. 94-5.

The first class rate from Chicago to the Missouri river has for many years been 20 cents per 100 pounds higher than the rate from the Mississippi river. (Mather, Rec., 4812.)

Again, Mr. Mather says (Rec., 4813):

> "The foregoing outline illustrates only the adjustment of first class rates. In Western Classification territory there are five numbered and five lettered classes, and the other classes all bear a certain percentage relation to the first class rates. This is true to the extent that any considerable reduction in the rate on first class involves necessary proportionate reductions in the rates on other classes—the severity of any such reduction lessening, of course, as the rates themselves grow less; but the rates on all classes must go down if one goes down, so that the same fixed relation between the classes may be maintained on the lower as on the higher basis.
>
> Similarly, the outline only illustrates the change in the adjustment between the principal

basing points in Western Trunk Line territory. But around these basing points are grouped all the adjacent cities and towns; so that an adjustment once reduced from Chicago, or Peoria, or the Mississippi river to the upper or lower Missouri river points, a corresponding reduction results from all points, both of origin and of destination, held common with these basing points. So the reductions become automatic covering all interstate movements throughout the whole territory pictured in the outline."

The result is that whenever a change is made in the Missouri state rate, it automatically and correspondingly changes the Chicago rate.

Map No. 2 illustrates this and shows the lines from Chicago and St. Louis to Council Bluffs, Iowa, and Omaha, Nebraska, whose rates are affected and controlled by the rates made to the so-called lower Missouri river crossings.

III.

CONTROL OF MISSOURI STATE RATES OVER TRAFFIC FROM SEABOARD TERRITORY TO THE MISSOURI RIVER.

Map No. 3 shows in graphic form the system of rates established about the time of the passage of the interstate commerce act and continued ever since, between the eastern seaboard territory, known as Trunk Line territory, and all points north of the Ohio and east of the Mississippi river, based upon a percentage scale. The rates from New York to Chicago were taken as representing 100 per cent. and rates to all other junctions were fixed at the proportional percentage of those rates that the mileage to

each point bore to the New York-Chicago mileage, thus fixing the basis to the Mississippi river at 117 per cent. of the Chicago rate, which is made to apply to all Mississippi river crossings from Dubuque to St. Louis, inclusive.

See Appendix G. Sixteenth Annual Report of the Interstate Commerce Commission, pp. 41-4.

(Also, Rec., 4036-7, 4042-3, 4067.)

St. Louis, East St. Louis, Hannibal and Quincy being among those crossings, whenever an existing schedule of rates across the State of Missouri is changed by state authority directed against intrastate traffic, necessitating a change in the interstate rate from East St. Louis and Quincy, to the western border cities, to meet the St. Louis and Hannibal rates, a similar change must be made proportionally in all the interstate rates to those cities throughout the Trunk Line territory.

The comparatively recent decision of the Interstate Commerce Commission in the so-called Burnham-Hanna-Munger case, affirmed by this court, (218 U. S., 88), serves but to emphasize the control which the local Missouri rates between the two rivers has so long exercised over interstate commerce.

In the case of *Warnock et al.* v. *Chicago & Northwestern Railway Company et al.*, 25 I. C. C. Rep., 546, 552, decided November 6, 1911, which grew out of the decision in the Burnham-Hanna-Munger case, the Interstate Commerce Commission says:

> "The situation is somewhat peculiar: The haul via some lines from the Mississippi river to the Missouri river is wholly within the State of Missouri, and via other lines is wholly with-

in the State of Iowa, and it is suggested that our order may provoke unfavorable action at the hands of a state commission. We have great respect for the official actions of state commissions, but we cannot withhold proper action in an interstate situation because it is anticipated that some opposing or retaliatory action will be taken by a state body."

IV.

CONTROL OF MISSOURI STATE RATES OVER TRAFFIC FROM EAST OF THE MISSISSIPPI RIVER TO WEST OF THE MISSOURI RIVER.

As we have just seen, the rates from the east to all Mississippi river crossings from Dubuque to St. Louis are the same.

It is likewise true that the rates from all Missouri river crossings, from Omaha to Kansas City inclusive, to Denver, Colorado Springs, Pueblo and Trinidad, known as Colorado common points, and intermediate territory are also relatively the same. It follows, therefore, that the shortest connecting line between the Mississippi river and the Missouri river determines the rate not only from all eastern territory to all points on the Missouri river but to Colorado common points and intermediate territory as well. This short line, as we have seen, is from Hannibal to St. Joseph and Kansas City, and hence any change in the state-made rate between those points is at once necessarily reflected in the interstate rates between all points in the territory named. (Rec., 4037, 4041-2, 4046, 4067.)

This situation, most important and extensive, is shown by Map No. 4.

V.

MISSOURI STATE CONTROL OF EASTBOUND GRAIN RATES.

Missouri river crossings constitute the chief primary grain markets of the country and rates are so adjusted as to permit the movement either through the cities along the river to the Atlantic seaboard and thence to the markets of the world or by way of the Gulf ports to the same markets. The difference of a fraction of a cent in favor of any route will control the movement. Hence any change in the Missouri state rates between Kansas City and Hannibal is automatically reflected via all routes, although the freight in its movement may not touch the State of Missouri. This plan has the effect of opening the markets of the world to all producers on equal terms. (Rec., 4048-65-67.)

In regard to this question, Mr. Mather says (Rec., 4814-5):

> "Besides, Missouri has actually made radical reductions in other rates that illustrate as well the principle of our contention. The legislature of 1905 ordered drastic reductions of rates on grain, flour, lime, salt, cement, stucco, lumber, agricultural implements, furniture, wagons and livestock, and the legislature of 1907 added stone, gravel, and other commodities. The rates have not been published, as the constitutionality of the legislation is in question before the courts, but if the State's right to order the reductions is finally established, the interstate rates on these bulk commodities, which constitute a large percentage of the carload tonnage of all western carriers, will come down with them.
>
> The reductions which will result in rates on

grain will illustrate. The short line distance rate between the Missouri and Mississippi rivers will be reduced from 13 cents per 100 pounds, on wheat, and 12 cents per 100 pounds on corn and other grain, to 8½ cents per 100 pounds on all grain. The State's action also calls for a reduction of a half-cent per hundred pounds in the proportional rate on wheat between Kansas City and Hannibal. This proportional rate of 9 cents is the rate applied on all wheat coming from beyond the Missouri river, and, as in the case of the class rates, it is the pivotal rate in the whole adjustment. If the legislature's action is finally upheld, a readjustment of the whole rate fabric on western grain will result. There is no more sensitive adjustment in existence than the grain rates. No single part of any of the through rates can be disturbed without disturbing the revenue on a large part of the whole movement.

Competition and market conditions require that the rates on grain from the States of Kansas and Nebraska shall be so adjusted that the grain raised in those States can move eastward freely through either of the primary markets at the Missouri river, Kansas City or Omaha. When these markets are reached, not alone the grain markets of the United States, but the foreign markets as well must be open to the producer, so that the Nebraska or Kansas producer may have the benefit of the best prevailing market price of the world today; and the adjustment must be maintained from day to day so that the large grain buyers may take the surplus grain into elevator storage, not only at the Missouri river, but at the large storage points at the Mississippi river, the Ohio river, the lake ports, the milling centers, and the Atlantic and Gulf seaboard, with the full assurance that when the demand makes eastern or southern shipment desirable he will have a parity of rates in either direction through any market. If the

reduced rates are finally enforced the material reductions within the State will be insignificant compared with the automatic reductions in the interstate adjustment which must follow. The same reduction must be made from Omaha, not only to St. Louis but to the other Mississippi river crossings—to Peoria and Chicago, the gateways to the central States; to Louisville, Evansville, Cairo and Memphis, the market points for all the southeastern States; to Little Rock, Texarkana, Fort Worth, Dallas and Shreveport, the principal market gateways for the States of Arkansas, Louisiana and Texas; and to Minneapolis, the largest of the milling centers. Any reduction in the rate to the Mississippi river and Chicago means just that much reduction in the revenue on grain moving to Boston, New York, Philadelphia, Baltimore and Newport News for export, as these rates are all made on the Mississippi river combination. And when these rates go down, a similar reduction is forced in the rate to Pensacola, Fla., Mobile, Ala., New Orleans, La., and Port Arthur and Galveston, Texas, for export."

Map No. 5 graphically shows this situation and statistics are unnecessary to show the immense volume of interstate traffic in grain. The court below specifically found that "the grain, live-stock and packing house interests at Kansas City and St. Joseph are enormous."

VI.

CONTROL OF MISSOURI STATE RATES OVER INTERSTATE PASSENGER RATES.

Coming now to the question of the necessary effect of the two cents per mile Missouri state passenger

rate upon interstate commerce, it is to be noted that passengers can exercise the option of buying a through ticket for an interstate journey, or they can perform that journey through the medium of a number of tickets bought to and from intermediate stations. A passenger going from St. Louis, Missouri, to Topeka, Kansas, an interstate journey, could buy an interstate ticket from St. Louis to Topeka, or, in case of a reduced rate in Missouri, he could buy his ticket based on the short line mileage from St. Louis to Kansas City, a state journey, and at Kansas City buy another ticket from that point to Topeka. (Rec., 4044.) Because of this condition, the railroads would be obliged to make a through ticket to Topeka based upon the short line mileage to Kansas City at the state rate. What is true of Topeka is true of all points west of the Missouri river for all the lines competing between St. Louis and Kansas City, which are shown on Map No. 6.

As showing the effect of the two cents per mile Missouri state passenger rate upon interstate commerce, it is an important fact that on business from what are known as common points in the eastern States, as for illustration, Indianapolis, Indiana, the short line mileage between Hannibal and St. Joseph or Kansas City controls the rate between the Mississippi and Missouri rivers via all lines, whether moving via St. Louis or Hannibal. (Rec., 4046.) The lines operating between Hannibal and the Missouri river are also shown on Map No. 6.

VII.

EFFECT OF MISSOURI STATE PASSENGER RATES ON THROUGH PASSENGER TRAFFIC.

Rates to Pacific Coast terminals and generally to western points are made by adding together the rates to and from the Missouri river. Thus, prior to the establishment of the two cent rate in Illinois and Missouri, the rate from Chicago to California was $62.50, made up of $12.50 from Chicago to the Missouri river and $50 beyond. The two cent rate reduced the $12.50 rate to $9.20, making the through rate $59.20, a reduction of $3.30, which reduction applied on every ticket going to the entire western territory. Inasmuch as the same rate applies by way of all routes reaching California points, any reduction in the local rate through Missouri necessarily operates to reduce the through rates from all eastern points irrespective of whether the route is through Missouri or otherwise. (Rec., 4055, 4412.)

This passenger rate situation is depicted on Map No. 7.

VIII.

DISCRIMINATION AGAINST INTERSTATE COMMERCE CAUSED BY MISSOURI STATE RATES.

1. Upon the issue of discrimination, it is well understood that in order to avoid it, the same rates must apply between points which because of their situation naturally compete on equal terms with other points. Quincy, Illinois, and Hannibal,

Missouri, on either side of the Mississippi river on the eastern border of the State, must compete for the business of the five Missouri river points in Kansas and Missouri on the western border. The lines serving these points are the Burlington and Wabash, the short line across the State, determining the rate. Whatever rate is made from Hannibal to Kansas City, Missouri, must of necessity apply to Kansas City, Kansas, and the other Missouri river points, and also whatever rate is made to these points from Hannibal must of necessity apply from Quincy to the same points.

Map No. 8 shows the situation.

2. The condition at Hannibal and Quincy just described also applies as between St. Louis, Missouri, and East St. Louis, Illinois, and the Missouri river cities. For instance, to avoid discrimination, St. Louis and East St. Louis must have the same rates to Kansas City, Missouri, and Kansas City, Kansas, and whatever rate applies across the State of Missouri, must of necessity apply between East St. Louis, Illinois, and Kansas City, Kansas.

If East St. Louis and Quincy attempted to maintain their interstate rates, to the western border cities, theretofore lawfully established, after St. Louis and Hannibal had adopted the lower state rates, the first named cities would be guilty of unjust discrimination as the service in the transportation of traffic from all four cities is under substantially similar circumstances and conditions. On the western border, rates to and from the five cities, two in Missouri and three in Kansas, must for the same

reasons be the same or unjust discrimination would result, and it is intolerable to conceive of any system of rates at the two Kansas Citys, whereby traffic at the Stock Yards would move at one rate or another according as it originated on one side or the other of the state line between Missouri and Kansas running through the Yards.

Map No. 9 shows the lines handling the traffic between St. Louis and Kansas City.

As shown thereon, it will be noted that on business from St. Louis to Kansas City, Missouri, the Chicago and Alton and the Missouri, Kansas and Texas perform an interstate service in competition with the Burlington, the Wabash, the Missouri Pacific and the Rock Island, which are wholly within the State, but all of the lines between St. Louis and Kansas City, Kansas, Atchison and Leavenworth, Kansas, or between East St. Louis and all the Missouri river points perform an interstate service and, to avoid discrimination, as well as to hold their business, must perform it at the same rates as apply in Missouri to Missouri points between the two rivers.

IX.

CONTROL OF MISSOURI STATUTORY RATES OVER RATES OF INTERSTATE CARRIERS THROUGH FORCE OF COMPETITION.

1. The situation between St. Joseph and Kansas City, Missouri, is illustrative of the necessary effect of state-made rates upon interstate commerce, and their forced adoption by the interstate lines in order to hold their business. There are four lines

which run between St. Joseph and Kansas City, two of which, the Burlington and the Grand Island, go through Missouri all the way, and two, the Missouri Pacific and the Great Western, perform an interstate journey between the two cities. Yet the state-made rates prescribed for the Burlington and Grand Island are forced beyond the power of resistance upon the Missouri Pacific and the Great Western. (Rec., 4038.)

Likewise, between St. Joseph and St. Louis, the Missouri Pacific performs an interstate journey, while the Burlington goes through Missouri all the way. The state-made rates applicable to the Burlington between those two cities necessarily control the rates by the Missouri Pacific.

Map No. 10 shows this situation.

2. An equally strong and impressive illustration of the necessary effect of state-made rates upon interstate commerce, is shown by the railroad situation between Kansas City and Joplin. Of the lines operating between the two cities, the Missouri, Kansas & Texas and the St. Louis and San Francisco run through the State of Kansas nearly all the way. The Kansas City Southern runs part of the way in Kansas and most of the way in Missouri, while the Missouri Pacific between the points named runs entirely in Missouri. The rates prescribed by Missouri state authority applying by the Missouri Pacific must be adopted by the other lines in order to enable them to hold their business, although they perform an interstate journey. (Rec., 4038-4040.)

Map No. 11 shows the Kansas City-Joplin situation graphically.

As a result, we respectfully assert the following propositions of fact as decisive of the cases at bar:

A.

The direct and necessary effect of the state statutes in controversy is to compel, as a matter of commercial necessity, the adoption of the same rates prescribed thereby in the interstate commerce of all the carriers in the same commodities at adjoining border cities both on the east and west of the State of Missouri where transportation circumstances and conditions are substantially similar.

B.

The Mississippi river and the Missouri river on either side of the State of Missouri, being basing points under the rate fabric lawfully existing at the time of the passage of the statutes complained of, and the rate between the two rivers by the short line in the State entering into the rates covering a very large volume of interstate traffic, both east and west, any changes in the state rates immediately and necessarily operate to cause corresponding changes in the interstate rates, both freight and passenger, thus directly interfering with and imposing a burden upon interstate commerce.

C.

If the carriers attempted to resist such commercial compulsion, their interstate commerce in the commodities covered by the state law would not only be lost and their revenues thereby reduced, constituting an interference with and a burden upon their interstate commerce, but they would also be guilty of unjust and unlawful discrimination against the border cities whose commerce would be transferred by the inexorable laws of trade to the Missouri cities across the border.

D.

Between points in Missouri reached by different carriers, some making an interstate journey between them and others running entirely within the State, such as St. Joseph and Kansas City, St. Joseph and St. Louis, and Kansas City and Joplin, the force of the state rates upon the rates of the interstate carriers to enable them to retain their competitive business between such points is direct and irresistible.

APPENDIX TO STATEMENT.

ILLUSTRATIONS FROM OTHER STATES AS TO THE EFFECT OF STATE RATES UPON INTERSTATE COMMERCE.

The direct and necessary effect of state-made rates upon interstate commerce, as shown by the facts in the Missouri cases, is emphasized and illustrated by the following example from Texas as to rates on salt:

The northwestern section of Texas, known as the "Panhandle," has two sources of salt supply, one from the Kansas and the other from the Texas producing fields, Hutchinson being the largest Kansas field and Grand Saline, Salt City and Colorado being competitive Texas fields. Dalhart and Amarillo are two cities in the Texas Panhandle.

Upon this subject Mr. Mather says (Rec., 4818-19):

> "That the Texas Commission exercises its rate-making powers with deliberate intent to control the interstate rates for the benefit of its industries appears from the following illustration:
>
> The Rock Island has a line running southwest from the State of Kansas, passing diagonally across the Panhandle of Texas into New Mexico and on to El Paso. There are large salt industries on this line at Hutchinson, Kansas, and in the year 1905 the Rock Island, being asked to establish a reasonable rate from Hutchinson into its Panhandle towns, published an average rate of 19½ cents. The average distance is about 300 miles. There are salt plants of considerable importance at Grand Saline, Salt City and Colorado, Texas, and under the State Commission's orders, the Rock Island, in connection with other

lines, had in effect an average rate of 20¼ cents per 100 pounds from these state salt plants to the Panhandle towns. The average haul to these points is from Grand Saline, 525 miles; from Colorado, 660, and Salt City, Texas, 690 miles. When the Rock Island's interstate rate came to the attention of the Texas Commission, it ordered the Rock Island's Texas line to non-concur in the reduction, threatening that if the interstate rate were allowed to stay in, they would compel the state carriers to haul salt from these state plants to the Panhandle points for 15 cents per 100 pounds. Needless to say, the interstate rate was withdrawn, and it remains today at the Texas maximum rate of 22½ (20½?) cents."

The following circular order of the Texas Commission, clearly indicating a subsequent unsuccessful effort of the carriers to reduce interstate rates on salt, is shown in Appendix B, headed "Emergency Rates," of the "Nineteenth Annual Report of the Railroad Commission of the State of Texas for the year 1910," pages 184-5:

(Circular No. 3488, effective July 25, 1910, expires August 20, 1910.)

Salt.

"In view of the reduced rates on salt, carloads, from Hutchinson and other salt producing points in Kansas to points on the Southern Kansas Railway of Texas, the Pecos & Northern Texas Railway and the Amarillo and Mexico Divisions of the Chicago, Rock Island & Gulf Railway, which creates a discrimination against shippers of salt from Texas producing points, the Railroad Commission of Texas, acting under the authority conferred upon it by law, hereby orders and directs that, for the transportation by railroads, of salt, carloads, from Texas producing points to points on the Mexico and Amarillo Divisions of the Chicago, Rock Island

& Gulf Railway; the Pecos & Northern Texas Railway, and the Southern Kansas Railway of Texas, the rate shall be fourteen (14) cents per 100 pounds. Rates at intermediate points not to be affected. (Circuliar No. 3407, effective May 15, 1910.)

It is ordered by the Railroad Commission of Texas that Circular No. 3407, issued by this Commission under date of May 4, 1910, and naming emergency rate of 14 cents per 100 pounds on salt, in carloads, from Texas producing points to points on the Southern Kansas Railway of Texas; Pecos & Northern Texas Railway, and the Mexico and Amarillo Divisions of the Chicago, Rock Island and Gulf Railway, be and the same is hereby withdrawn and canceled, effective as follows:

To Pecos and Southern Kansas points, June 28, 1910.

To Rock Island points, July 12, 1910.

(Circular No. 3447, effective as noted.)"

The situation is shown by Map No. 12.

Two other pertinent illustrations of the direct effect of state-made rates upon interstate commerce are furnished by the Railroad Commission of the State of Arkansas in their Official Reports:

In the "First Annual Report of the Railroad Commission of the State of Arkansas," 1899-1900, the following statement is made on page 20-23:

"In presenting the merit of the Commission's tariff, we can not do better than quote from a letter recently received by the Commission from a well-known business firm of Springdale, this State, summed up as follows, to-wit:

'The consumer and local dealer's advantage through the Commission is that the jobber within the State is enabled to deliver goods to all points covered by your tariff at lower rates than is possible for jobbers located outside of the

State. This of itself is no inconsiderable advantage, and should give you the good will of every jobber in the State.

As an instance of the indirect workings of your tariff, we call your attention to the rate made on fourth class merchandise from this point to Fort Smith and *vice versa.* Fort Smith jobbers on all fourth class goods have a rate of 14 cents per 100 pounds to Springdale. When this went into effect it caused a great deal more of the trade to be given to Fort Smith than they had been receiving, and as a result Springfield (Mo.) jobbers asked and received from the 'Frisco a 20-cent rate on the same class of goods, which about equalizes prices, but it nevertheless gave the Fort Smith jobbers a reputation it would have taken them years to build up had it been under the old freight rates. And the advantage still lies with our home town and tends to the improvement of Fort Smith and other jobbing towns in the State. *And the consumer gets his goods at a more reasonable price, the only sufferer being the holder of railway stocks and bonds.*

The end is not even here, for the low state rate and the one obtained at Springfield, Missouri, makes it impossible for St. Louis and other distant jobbers to compete with them, and as a result they will either have to be content with such business, or come in competition with the points enjoying this rate, or ask for a lower rate to all points controlled by the Commission.

As they will probably ask for and obtain this rate, you can readily see that once more the consumer has an advantage given him and is brought nearer to all markets through your influence.

It is an advantage to us as an inducement to manufacturers to locate here, where we have all classes of material for their use, and they can surely manufacture the raw material into the finished article and ship to a better advantage

than they could at the time when they were at the mercy of the railways and were compelled to locate at some competitive point or not locate at all.

Now, as the rate is stated from point to point, they can locate at whatever point is best suited to their purpose, with the certain knowledge of what their freight rate will be to the state line and some competitive point where reasonable rates are obtainable.

In fact, it is a step in the right direction, and one whereby you protect the people much more effectively than many other Commissions now in existence, and we feel sure that, if you are allowed to continue your work, you will save the State many times the cost of your maintenance each year, besides giving us a reputation with the outer world which we have not heretofore obtained.'

The author of the foregoing letter has quite a comprehensive idea of the benefits of the Commission's tariff.

Interstate points, to compete with Arkansas jobbing points, will force down rates to all points covered by the Commission's tariff, and will also force the roads to give them commodity rates to Arkansas points, with corresponding reductions. The consequence is that the Commission not only reduces local rates, but inferentially affects and reduces through rates. He has also studied the rates and observed the effect already beginning to manifest itself on the manufacturing interest of this State."

In the "Third Annual Report of the Railroad Commission of the State of Arkansas," 1902, appears the following, on pages 8-9, under the title

"HOW THE COMMISSION'S TARIFFS AFFECT INTERSTATE RATES."

"At all points where the Commission's tariffs have come in competition with rates from interstate points, they have had the effect of break-

ing down the interstate rate by proportionate reductions from such points.

September 15, 1901, the Commission's tariffs completely broke down the rates from Memphis and St. Louis into this State. After the rate had been put in from Memphis, to become effective September 15, 1901, here is what the Commercial-Appeal (Memphis) of September 6, 1901, had to say of it:

'It is with gratification that we announce the receipt of St. L. I. M. & S. tariff No. 4226, effective September 15, from Memphis to all stations on their line. This tariff covers the adjustment of the Memphis rates to those from Arkansas points instituted by the Railroad Commission of that State and places Memphis on a fair basis in competition with those points as provided for in the agreement between the railroad company and this bureau. Jas. S. Davant, Commissioner of the Memphis Freight Bureau.

The new tariff cuts the rate from Memphis and the Iron Mountain points in that State from 40 to 60 per cent. of what it was only a short time ago, and cuts fully 25 per cent. off the present tariff in effect there. Memphis will then be on a competitive basis with Cairo, St. Louis, Little Rock and Pine Bluff for all that section of the country to which it is the natural gateway and in which the trade has already been doubled by a former slight reduction in the rate. The new rates are the effect of a settlement of a litigation started against that company four years ago through the freight bureau and modified to accord with the more recent action of the Arkansas Railroad Commission.'

There was likewise a proportionate reduction of rates from St. Louis into this State, made effective at the same time.

The beneficent results of the Commission's rates are acknowledged and verified at home and abroad. The consumer is the recipient of its benefits, because competition in trade forces down profits to a minimum."

BRIEF.

I.

THE COMMERCE CLAUSE OF THE CONSTITUTION GIVES TO CONGRESS EXCLUSIVE AND PLENARY POWER OVER COMMERCE AMONG THE STATES AND ANY STATE LEGISLATION WHICH DIRECTLY AFFECTS OR DISCRIMINATES AGAINST SUCH COMMERCE IS VOID.

In *Gibbons* v. *Ogden*, 9 Wheaton, 1, Chief Justice Marshall says on pages 194-6:

> "It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.
>
> If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.
>
> The subject to which the power is next applied, is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.
>
> It is not intended to say that these words comprehend that commerce which is *completely internal*, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to *or affect other States*. Such a power would be inconvenient, and is certainly unnecessary.
>
> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The

phrase is not one which would probably have been selected to indicate the *completely* interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the *exclusively* internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, *and to those internal concerns which affect the States generally;* but not to those which are completely within a particular State, *which do not affect other States,* and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The *completely internal* commerce of a State, then, may be considered as reserved for the State itself.

But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. * * *

If Congress has the power to regulate it, that power must be exercised whenever the subject exists. * * *

This principle is, if possible, still more clear, when applied to commerce 'among the several States.' They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce among them; and how is it to be con-

ducted? Can a trading expedition between two adjoining States commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law especially when the constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States."

Again on pages 196 and 197, the court says:

"We are now arrived at the inquiry—what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. * * * If, as has always been understood, the sovereignty of Congress though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. * * *

The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, *in any manner*, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.' It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition under consideration applies."

Again, the court says on page 200:

> "In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?"

Again, the court, after conceding the power of the State to pass "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c.," says, on pages 203-4:

> "No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly *incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another, in the same State, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police.*"

Again, after referring to acts of Congress "directing the officers of the general government to conform to and assist in the execution of the quarantine and health laws of a State," the court says on page 206:

> *"But in making these provisions, the opinion is unequivocally manifested that Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce."*

Again, the court says on pages 209-210:

> "It has been contended, by the counsel for the appellant, that, as the word to 'regulate' implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.
>
> There is great force in this argument, and the court is not satisfied that it has been refuted.
>
> Since, however, in exercising the power of regulating their own *purely internal* affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether *the laws of New York*, as expounded by the highest tribunal of that State, have, in their application to this case, *come into collision with an act of Congress*, and deprived a citizen of a right to which that act entitles him. *Should this collision exist, it*

will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several States, or, *in virtue of a power to regulate their domestic trade and police.* In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous."

In *Steamboat Company* v. *Livingston*, 3 Cowen, 714, the New York Court of Errors, in commenting on and interpreting the decision in *Gibbons* v. *Ogden* soon after it was rendered, says:

"The Supreme Court says, 'commerce among the states cannot stop at the boundary line of each State, but may be introduced into the interior.' Again: 'commerce among the States must, of necessity, be commerce within the States.' In the same opinion, we find as full a definition of the term as the facts of the case required, and beyond that it was not necessary to go. Accordingly, it is said, 'comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one.' Again: 'the genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are *completely* within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The *completely* internal commerce of a State, then, may be considered as reserved for the State itself.'

It is evident from these expressions, that the Supreme Court was of opinion, that over a part of the internal commerce of the States, Con-

gress has power. Precisely how far that power extends, it did not become necessary to decide; but from the expressions, *completely internal, exclusively internal,* and *purely internal,* it is clearly inferable, *that all that part of the internal commerce of a State which is not exclusively internal, is subject to the regulation of Congress.* * * *

The Supreme Court says, 'if Congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police.'

The power of Congress to license vessels to sail from one port to another in the same State, is here distinctly asserted, as incidental to the power directly granted. It seems, also to be, impliedly at least, admitted, that this is a regulation of commerce within a State, and subject to State legislation. It is elsewhere asserted, that the power to regulate commerce with foreign nations, and among the States, is necessarily an exclusive power. From what is here said, it seems that the incidental power to regulate commerce within the State, is a concurrent power; and if so, it is admitted that in case of collision, the law of Congress must prevail. But the opinion here seems to consider the purely internal commerce as not affected by the act of licensing vessels to sail from port to port within the State. *If this be so, then the internal commerce over which the State has exclusive control, is something existing where coasting vessels cannot come, or have no right to navigate, as in the case of a ferry within the State.* And hence it follows, that the commerce among the States, which Congress has power to regulate, either directly or incidentally, is that commerce which may be carried on by vessels regu-

larly licensed by the laws of Congress; or in other words, the coasting trade. * * *

What, then, is internal commerce?

An answer to this inquiry will necessarily lead to some repetition. It is contended by the appellants, and is decided by the chancellor, that it comprehends all that navigation where the *termini* of the voyage are both within the same State. Chief Justice Marshall has said, that the word 'among' may properly be restricted to that commerce which concerns more States than one. Again: 'the enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the *exclusively* internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.' What is here said, it must be admitted, conveys no definite idea of what is the *completely* or *exclusively internal commerce* alluded to. In a subsequent part of the opinion, an explanation is to be found. When speaking of inspection laws, he observes, 'They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of

this mass. No direct general power, over these objects, is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the union can reach them, it must be for national purposes; it must be when the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. *It is obvious, that the government of the union, in the exercise of its express powers—that, for example, of regulating commerce with foreign nations and among the States—may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State.* If Congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State; or to act directly on its system of police.'

A definition of what is meant by internal commerce, appears, in part, by the above extract from the opinion of the Supreme Court. To extend it to all its various subjects, would here be entirely useless. The object of the present inquiry is completely answered, by showing what is not that purely internal commerce spoken of as exclusively subject to State legislation; and I trust I have already shown, *that the navigation of the Hudson, a public navigable river, is not included in such internal commerce; but that it composes a part of the coasting trade, and is, therefore, subject to the regulation and control of Congress.* * * *

One leading object of the constitution was to secure an equality of commercial rights to the citizens of the general government, in whatever State they might reside. We ought not to forget that we are the citizens of two distinct, yet connected governments. Each has its proper

sphere of action. The powers given to the general government are to be first satisfied. Some of these powers are exclusive, and some concurrent; but when concurrent, the provisions of the general government are paramount."

In case of the State Freight Tax, 15 Wall., 232, it is said on pages 279, 280:

"Cases that have sustained State laws, alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such, as in *Gilman* v. *Philadelphia*, it was said 'can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively.' However this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. *Surely transportation of passengers or merchandise through a State,* or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power."

In *Henderson* v. *Mayor of New York*, 92 U. S., 259, the court says on pages 271-3:

"Nothing is gained in the argument by calling it the police power. Very many statutes, when the authority on which their enactments rest is examined, may be referred to different sources of power, and supported equally well under any of them. A statute may at the same time be an exercise of the taxing power and of the power of eminent domain. A statute pun-

ishing counterfeiting may be for the protection of the private citizen against fraud, and a measure for the protection of the currency and for the safety of the government which issues it. It must occur very often that the shading which marks the line between one class of legislation and another is very nice, and not easily distinguishable.

But, however difficult this may be, it is clear, from the nature of our complex form of government, that, whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the States.

'It has been contended,' says Marshall, C. J., 'that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy, not only of itself, but of the laws made in pursuance thereof. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme.' Where the Federal government has acted, he says 'In every such case the act of Congress or the treaty is supreme; and the laws of the State, though enacted in the exercise of powers not controverted, must yield to it.' 9 Wheat., 210.

It is said, however, that under the decisions of this court, there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the State, and its legislation be valid so long as it interferes with no act of Congress, or treaty of the United States. Such a proposition is supported by the opinions of the several judges in the

Passenger Cases; by the decisions of this court in *Cooley* v. *The Board of Wardens*, 12 How., 299; and by the cases of *Crandall* v. *Nevada*, 6 Wall., 35, and *Gilman* v. *Philadelphia*, 3 Wall., 713. But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree, that under the commerce clause of the Constitution, or within its compass, there are powers, which, from their nature, are exclusive in Congress; and, in the case of *Cooley* v. *The Board of Wardens*, it was said, that 'whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

In *County of Mobile* v. *Kimball*, 102 U. S., 691, the court, in speaking of the power of Congress under the commerce clause of the Constitution, says on page 697:

"The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose

that the commerce in that commodity or by that means of transportation shall be free. *There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation.*

Of the class of subjects local in their nature, or intended as mere aids to commerce, which are best provided for by special regulations, may be mentioned harbor pilotage, buoys, and beacons to guide mariners to the proper channel in which to direct their vessels."

Again, the court says on page 702:

"Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. *Action upon it by separate States is not, therefore, permissible.*"

In *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S., 196, the court says on page 203:

"Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities."

Again, on page 204, the court says:

> "The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation. *Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products, and against those of other States.* It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress."

In *Railroad Commission Cases*, 116 U. S., 307, the court says on page 334:

> "This company is not relieved entirely from State regulation or State control in Mississippi simply because it has been incorporated by, and is carrying on business in the other States through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed

by the Constitution of the United States within the exclusive jurisdiction of Congress, that is to say, using the language of this court in *Cardwell* v. *Bridge Co.*, 113 U. S., 205, 210, 'when the subjects on which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the States.' Under this rule nothing can be done by the government of Mississippi *which will operate as a burden on the interstate business of the company* or impair the usefulness of its facilities for interstate traffic."

In *Wabash, etc., Railway Co.* v. *Illinois*, 118 U. S., 557, the court says, on page 573:

"This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. *Cook* v. *Pennsylvania*, 97 U. S., 566, 574; *Brown* v. *Maryland*, 12 Wheat., 419, 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.

The argument on this subject can never be better stated than it is by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat., 1, 195-6. He there demonstrates that commerce among the States, like commerce with foreign nations, is necessarily a commerce which crosses State lines, and extends into the States, and the power of Congress

to regulate it exists wherever that commerce is found. *Speaking of navigation as an element of commerce, which it is, only, as a means of transportation, now largely superseded by railroads,* he says: *'The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York and act upon the very waters (the Hudson river) to which the prohibition now under consideration applies,'* p. 197. So the same power may pass the line of the State of Illinois and act upon its restriction upon the right of transportation extending over several States, including that one."

In *United States* v. *Colorado, etc., Railroad Company,* 157 Federal, 321 (United States Circuit Court of Appeals, Eighth Circuit), the court says:

"The Constitution reserved to the Nation the unlimited power to regulate interstate and foreign commerce, and if that power cannot be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary in order to regulate interstate commerce fully and effectually. The people of the United States carved out of their sovereign power, reserved from the States and granted to the Congress of the United States exclusive and plenary power to regulate commerce among the States and with foreign nations. That power is not subordinate, but it is paramount to all the powers of the States. If its independent and lawful exercise of this congressional power and the attempted exercise by a State of any of its powers impinge or conflict, the former must prevail and the latter must give way. The Con-

stitution and the Acts of Congress passed in pursuance thereof are the supreme law of the land. That which is not supreme must yield to that which is supreme."

In *Northern Securities Company* v. *United States*, 193 U. S., 197, the court says, on page 333:

"*An Act of Congress constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all;* as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligation of an oath so to regard a lawful enactment of Congress. *Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the Government and its laws might be prostrated at the feet of local authority. Cohens* v. *Virginia*, 6 Wheat., 264, 385, 414. These views have been often expressed by this court."

Again, the court says on pages 335, 336:

"By the express words of the Constitution, Congress has power to 'regulate commerce with foreign nations and among the several States, and with the Indian tribes.' In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition. *In re Rahrer*, 140 U. S., 545; *Lottery Case*, 188 U. S., 321, 355, and authorities there cited. Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice Marshall for the court in *Gibbons* v. *Ogden*, 9 Wheat., 1, 196, 197, that the power of Congress to regulate commerce among the States and with foreign nations is the power 'to prescribe the *rule* by which commerce *is to be governed*'; that

such power 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution'; that 'if, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States, is vested in Congress *as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States'*; that a sound construction of the Constitution allows to Congress a large discretion, 'with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people'; and that if the end to be accomplished is within the scope of the Constitution, 'all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional.' *Brown* v. *Maryland*, 12 Wheat., 419; *Sinnot* v. *Davenport*, 22 How., 227, 238; *Henderson* v. *The Mayor*, 92 U. S., 259; *Railroad Company* v. *Husen*, 95 U. S., 465, 472; *County of Mobile* v. *Kimball*, 102 U. S., 691; *M. K. & Texas Ry. Co.* v. *Haber*, 169 U. S., 613, 626; *The Lottery Case*, 188 U. S., 321, 348. In *Cohens* v. *Virginia*, 6 Wheat., 264, 413, this court said that the United States were for many important purposes 'a single nation,' and that 'in all commercial regulations we are one and the same people'; and it has since frequently declared that commerce among the several States was a *unit*, and subject to national control. Previously, in *McCullough* v. *Maryland*, 4 Wheat., 316, 405, the court had said that the Government ordained and established by the Constitution was, within the limits of the powers granted to it, 'the Government of all; its powers are delegated

by all; it represents all, and acts for all,' and was 'supreme within its sphere of action.'"

Again the court says on pages 352, 353:

"Under the Articles of Confederation commerce among the original States was subject to vexatious and local regulations that took no account of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country was given by the Constitution full power to regulate commerce among the States and with foreign nations. In *Brown* v. *Maryland*, 12 Wheat., 419, 446, it was said: 'Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress.' Railroad companies, we said in the Trans-Missouri Freight Association case, 'are instruments of commerce, and their business is commerce itself.' And such companies, it must be remembered, operate 'public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation.' *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S., 641, 657; *Chicago, etc., R. R. Co.* v. *Pullman Car Co.*, 139 U. S., 79, 90; *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447, 475; *United States* v. *Trans-Missouri Freight Association*, 166 U. S., 290, 332; *Smyth* v. *Ames*, 169 U. S., 466, 544; *Lake Shore, etc., Ry. Co.* v. *Ohio*, 173 U. S., 285, 301. When such carriers, in the ex-

ercise of public franchises, engage in the transportation of passengers and freight among the States they become—even if they be State corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce."

Mr. Justice White, in his dissenting opinion, says on pages 367, 369:

"At the outset, the absolute correctness is admitted of the declaration of Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, that the power of Congress to regulate commerce among the States and with foreign nations 'is complete in itself and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution'; and that if the end to be accomplished is within the scope of the Constitution, 'all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional.'

The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce which flows from the authority conferred by the Constitution, is thus conceded. * * * Accepting the test announced in *Gibbons* v. *Ogden* for determining whether a given exercise of the power to regulate commerce has in effect transcended the limits of regulation, it is essential to accept also the luminous definition of commerce announced in that case and approved so many times since, and hence to test the question for decision by that definition. The definition is this: 'Commerce undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between na-

tions and parts of nations in all its branches, *and is regulated by prescribing rules for carrying on that intercourse.*'"

Again, Mr. Justice White says on page 379:

"* * * The definition given of interstate commerce in *Gibbons* v. *Ogden*, previously referred to, was reiterated and in addition the definition expounded in *County of Mobile* v. *Kimball*, 102 U. S., 691, was approvingly quoted. That definition was as follows (p. 574):

'Commerce with foreign countries and among the states, strictly construed, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible.'"

In *Western Union Telegraph Company* v. *Kansas*, 216 U. S., 1, the court says on pages 26-7:

"The authorities cited show that this court has guarded with both diligence and firmness the freedom of interstate commerce against hostile State or local action, as such action has been manifested by regulations operating, in some instances, directly, in others indirectly, upon the means of instruments employed in that commerce. This has been done without violating the principle that an interstate carrier, entering a State for purposes of its business, is subject to local regulations that in their essence and purpose only incidentally affect interstate commerce, but are established in good faith for the protection, safety, comfort and convenience of the people, are not in themselves in any real,

just sense an obstruction to or in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the State, and to be respected until Congress covers the subject by legislation."

Again the court says, on pages 37 and 38:

"We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government and not in hostility to rights secured by the supreme law of the land."

In *Pullman Company* v. *Kansas*, 216 U. S., 56, Mr. Justice White, in his concurring opinion, says on page 65:

"1. A State may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. This is so elementary as to require no reference to the multitude of authorities by which it is sustained.

2. Even though a power exerted by a State, when inherently considered, may not in and of itself abstractly impose a direct burden on inter-

state commerce, nevertheless *such exertion of authority will be a direct burden on such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discrimination against the right to carry it on.* *Darnell* v. *Memphis*, 208 U. S., 113; *American Steel & Wire Co.* v. *Speed*, 192 U. S., 500, and authorities there cited."

In *B. & O. R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S., 612, involving the hours of service law, Mr. Justice Hughes, speaking for the court, says on pages 617-619:

"The statute, therefore, in its scope, is materially different from the act of June 11, 1906, chapter 3073, 34 Stat., 232, which was before this court in the *Employers' Liability Cases*, 207 U. S., 463. There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that if a carrier was so engaged the act governed its relation to every employe, although the employment of the latter might have nothing whatever to do with interstate commerce. In the present statute, the limiting words govern the employes as well as the carriers.

But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employes in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employes who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.

This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective

exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them. *Johnson* v. *Southern Pacific Co.*, 196 U. S., 1; *Adair* v. *United States*, 208 U. S., 177, 178; *St. Louis, I. M. & S. Railway Company* v. *Taylor*, 210 U. S., 281; *Chicago, Burlington & Quincy Railway Company* v. *United States*, decided May 15, 1911, 220 U. S., 559. The fundamental question here is whether a restriction upon the hours of labor of employes who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employes and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. *Chicago, Burlington & Quincy Railroad Company* v. *McGuire*, 219 U. S., 549.

If, then, it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employes engaged

> in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or *by the commingling of duties relating to interstate and intrastate operation.*"

In *Ex parte Young*, 209 U. S., 123, which was a habeas corpus proceeding growing out of certain litigation in the early history of the Minnesota Rate Cases, which are now here for final determination upon the merits, the court says, on page 145:

> "Still another federal question is urged, growing out of the assertion that the laws are, by their necessary effect, an interference with and a regulation of interstate commerce, the grounds for which assertion it is not now necessary to enlarge upon. The question is not, at any rate, frivolous."

With the record now before the court, the question is not only not frivolous but it is controlling and decisive not only as to Minnesota but as to Missouri and Kentucky and Arkansas and Oregon as well.

In the *Oklahoma Rate Cases*, 177 Fed., 493, Hook, Circuit Judge, says:

> "The regulation of commerce among the states having been intrusted to Congress, and being therefore beyond the control of the State, difficult problems arise when the rates involved are those of a railroad company, for it generally happens, as here, that its property, whether entirely within the State or not, is employed commonly and inseparably in both interstate and local transportation; both kinds of traffic are moved in the same trains, over the same road and with the aid of the same employes. Again, it is generally the case, as here, that the railroad is but part of a larger system extending into or through other States, and there are fac-

tors of value, revenue, and expense which, though without the State, have such relation to and effect upon those within that they must be regarded in reaching a just conclusion.

* * * * *

A company may have, elsewhere, property of great value employed in aid of all its transportation business. Distant connections with important commercial centers, an outlet to tidewater and the like may affect favorably the worth of every mile of road in the system. It is general knowledge that there is an important element of value in a railroad as a whole which the part within the State, solely and separately regarded, does not possess. While the question ultimately is the value of the road within the State, the influence upon that value of things external is to be considered; and in the common judgment of men it is to some extent reflected in the amount and value of the stocks and bonds resting upon the system. Nor can it properly be said that such influence affects only the value for the interstate business of the company with which the State is not concerned in making local rates. There is too intimate a relation between commerce within the State and that among the States, and too much interdependence in their mutual growth and prosperity. A railroad system is essentially a unit and is generally so regarded.

* * * * *

It is said by counsel for defendants that because of the higher range of local rates in Oklahoma that State should be credited with a greater percentage of the interstate revenue than the mileage basis yields. That is but another way of asserting that local rates so directly affect interstate rates and the earnings therefrom that their influence may be measured and must be regarded by the courts. If that be true, then in every case every reduction by the

State authorities of local rates directly and materially affects a subject-matter the regulation of which is vested in Congress."

In *Shepard* v. *Northern Pacific Railroad Company*, 184 Federal, 765, Circuit Judge Sanborn, in deciding the Minnesota Rate Cases, says on page 770:

"To the extent necessary completely and effectually to protect the freedom of and to regulate interstate commerce the nation by its Congress and its courts may affect and regulate intrastate commerce, but no farther.

To the extent that it does not substantially burden or regulate interstate commerce a State may regulate the intrastate commerce within its borders, but no farther.

If the plenary power of the nation to protect the freedom of and to regulate interstate commerce and the attempted exercise by a State of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter must give way, because the Constitution and the acts of Congress passed in pursuance thereof are the supreme law of the land and 'that which is not supreme must yield to that which is supreme.'"

Again, on page 773, Judge Sanborn says:

"The acts of the Legislature of Minnesota and the orders of its commission are so general and so far reaching in their effect that there is no doubt that they unavoidably affect the interstate commerce of the companies. In the light of the rules and decisions reviewed, the question here at issue therefore becomes: Do these statutes and orders substantially burden or only incidentally or remotely affect the interstate commerce of the companies? This question, however, may not be answered by the words or terms of the laws and orders, or by a considera-

tion of the intent or purpose of their makers alone. The touchstone to the true answer to the question and the test of the validity of the orders and statutes is their effect upon interstate commerce.

It is the effect, and not the terms or purpose, of state regulations of its local commerce, that determines whether or not they so substantially burden interstate commerce that they violate the commercial clause of the Constitution. And this is a judicial question which each court must determine on its own responsibility on the special facts of each particular case, and in the determination and decision of which it 'must obey the Constitution rather than the lawmaking department of the government.'"

Again, on page 793, Judge Sanborn says:

"Moreover, the acts and orders making these intrastate reductions necessarily operate to discriminate against interstate commerce and the right of the companies to carry it on, and in that way constitute a direct burden upon such commerce. Mr. Justice White said in the Pullman Company's Case (216 U. S., at page 65), that, though a power exerted by a State may not abstractly impose a direct burden on interstate commerce, yet such exertion will be a direct burden upon such commerce if the power as exercised operates a discrimination against that commerce, or, what is equivalent thereto, discriminates against the right to carry it on. If the companies exercised their right to maintain and did maintain their former interstate rates upon that portion of their interstate commerce affected by the local Minnesota rates, they lost to local commerce that interstate commerce, because it passed by rebilling and local contracts at the sums of the locals. This necessary effect of the local maximum rates was a direct discrimination against interstate commerce and the right to conduct it, and hence a direct burden

upon that commerce. If, on the other hand, to avoid this discrimination the companies reduced their rates, that reduction was a like direct burden, and no course was open to them whereby they could exercise their constitutional right to conduct their interstate commerce free from the direct regulation thereof effected by these acts and orders."

II.

THE POWER OF THE GENERAL GOVERNMENT OVER COMMERCE AMONG THE STATES BY THE GREAT ARTIFICIAL HIGHWAYS OF RAIL IS JUST AS COMPREHENSIVE AND CONTROLLING AND ALL-EMBRACING AND EXCLUSIVE OF STATE BURDEN OR INTERFERENCE AS IT IS OVER SUCH COMMERCE BY THE GREAT NATURAL HIGHWAYS OF WATER.

Just as no State can regulate the commerce of any navigable stream except in subjection to national authority, so no State can regulate the commerce of any railroad highway or impose any burden thereon, except in subjection to and in harmony with the commerce clause of the Constitution and the act to regulate commerce and the amendments thereto passed in pursuance thereof, whereby the whole field of regulation of commerce over such highway has been covered.

In *Perkins* v. *Northern Pacific Railway Company*, 155 Federal, 445, Lochren, J., in announcing his opinion, said on page 454:

"I have no doubt that Congress might very properly under the constitutional provision giving it the entire power of control over interstate

commerce, *assume control of the avenues of interstate commerce*, of the railroads which are engaged in interstate commerce, and of all rates which are collected by those railroads, whether within the States or without the States, because the matter of those rates would affect these avenues of interstate commerce, and might affect their ability to continue as avenues of interstate commerce. The rates, if they were fixed by the States might be fixed so low in one State, and another, and all of them, that the railroads could not exist and could not perform their functions as carriers of interstate commerce, and for the purpose of securing these railroads as carriers of interstate commerce, Congress would have the power, under that provision, to take the entire control of the regulation and the rates which the carriers of interstate commerce, upon the avenues of interstate commerce, would have the right to charge, the same as Congress has assumed the right, under the very same clause, to control the navigation of the coastwise waters, bays, and lakes, and the rivers running through the country, even if the rivers are entirely within a particular State. They have as much control of the Mississippi river above the Falls of St. Anthony as they have between St. Louis and New Orleans; the same control of the Minnesota river, which is entirely within the State—both of which streams have been used for the purpose of navigation within my recollection. On the upper Mississippi, above the falls, there were two lines of steamboats, before the war, for some years, and upon the Minnesota river there were several lines of steamboats, running as far up as Ft. Ridgeley, I think, and after Congress assumed the control of navigation entirely, it applied this control to those rivers just as much as to rivers that run between States and through several States, and applied it to the bays and inlets on the coasts of the ocean, where there was navigation running from one State to an-

other. The same with the coasts upon the Great Lakes. I think there is no doubt but that matter would be within the control of Congress."

In *Pensacola Tel. Co.* v. *West, etc., Tel. Co.*, 96 U. S., 1, the court says on pages 8-9:

"Congress has power 'to regulate commerce with foreign nations and among the several States' (Const., Art. 1, Sec. 8, Par. 3); and 'to establish postoffices and postroads' (Id., par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. Art. 6, par. 2. A law of Congress made in pursuance of the Constitution suspends or overrides all state statutes with which it is in conflict.

Since the case of *Gibbons* v. *Ogden* (9 Wheat., 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Postoffices and postroads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business

to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation."

In *California* v. *Pacific Railroad Co.*, 127 U. S., 1, the court says on pages 39, 40:

"The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads

connecting the east with the Pacific, traversing States as well as Territories, and employing the agency of state as well as federal corporations."

In *Monongahela Navigation Company* v. *United States*, 148 U. S., 312, the court says on page 342:

"But the power of Congress is not determined by the character of the highway. * * * We are so much accustomed to see artificial highways, such as common roads, turnpike roads and railroads, constructed under the authority of the States, and the improvement of natural highways carried on by the general government, that at the first it might seem that there was some inherent difference in the power of the national government over them. But the grant of power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of highway. * * * The differences between the two are in their origin —nature provides the one, man establishes the other."

In re Debs, 158 U. S., 564, it is said on pages 590, 591:

"Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the Courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other."

In *Mondou* v. *New York, New Haven & Hartford Railway Co.*, 223 U. S., 1, decided January 15, 1912, the court says:

> "The clauses in the Constitution (Art. I, Sec. 8, clauses 3 and 18), which confer upon Congress the power 'to regulate commerce * * * among the several States' and 'to make all laws which shall be necessary and proper' for the purpose have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:
>
> 1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, *whether carried on by water or by land.*"

The States would not for a moment assert jurisdiction over the navigable waters of the United States similar to that for which they insist as within their rights over the railway systems of the country, although they are forced to admit that the same provision of the federal Constitution applies in protecting commerce among the States over both highways, whether by water or by rail, from state interference.

The reason for this difference of view is not difficult to discover.

The waterways of the country were national highways at the time of its creation and commerce among the States being wholly by water in the early history of the Republic, national control over such

commerce to the exclusion of all state interference was asserted by this court in *Gibbons* v. *Ogden* when the question first arose, and has been recognized and acquiesced in by the States ever since.

But the railroads were born in the respective States. Their infancy was spent within the borders of the States creating them and their operations were for a long time confined to state lines. All traffic over them was "exclusively," "purely" and "completely" intrastate. The States not only had the right but got into the habit of controlling and regulating all their activities. Extensions and consolidations came slowly, until large systems extending half way across the continent resulted, but state control over local rates still continued because for a long time such rates had no direct effect upon interstate rates, commerce in competitive commodities between the different States developing only gradually. As such competition became substantial, the States began to attempt the protection of their own products by lowering rates for the transportation thereof within their own respective borders. The interstate railroads, as their business developed, ignored state lines in their operation, carried intrastate and interstate traffic indiscriminately on all their trains, and schedules of rates, local and interstate, having some just relation to each other in securing the free movement of commerce, were established by the carriers and after the passage of the interstate commerce act and its amendments their interstate schedules were filed with the Commission and had the force of law.

Thereafter the effect of state-made rates upon interstate rates became and is direct and controlling, the Commission became and is embarrassed by state action in its administration of the law, and the States, having so long exercised their jurisdiction over local traffic, are reluctant to yield the same, and still contend that their legislation, if confined in terms to intrastate commerce, is still valid and that it is a legal impossibility for such legislation to interfere with interstate commerce.

This right of state control is still insisted upon, notwithstanding the direct and immediate effect of such legislation may be to convert interstate commerce, theretofore lawfully existing, into intrastate commerce, to the substantial loss of the interstate carriers, thereby creating undue preferences in favor of state trade centers and unjust discriminations against interstate trade centers, both adjacent and remote, or compelling such carriers, by the irresistible law of competition, to reduce their theretofore lawful interstate rates, with consequent diminution of revenue, in order, as a matter of self-protection, to hold their business and prevent disaster and possible bankruptcy.

It seems to be contended by the advocates of state control over railroad rates, regardless of the effect upon interstate rates, that because interstate roads voluntarily located their lines in two or more States and voluntarily built up a system of rates based upon the rate across the State of Missouri, such roads cannot be heard to complain; that they can

retire from the business if the state-made rate affects them adversely or change the basis on which their rate fabric has been built up.

In answer to such contention, we wish to emphasize the words of Mr. Justice Holmes in the case of *Swift* v. *United States*, 196 U. S., 375, 398:

> "*Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.* When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."

This language was quoted with approval in *Loewe* v. *Lawlor*, 208 U. S., 274, 299.

Hence, whatever the history of the location, construction and consolidation of given railroads, whatever the origin of the rate system regulating the traffic thereover, from which has resulted "a current of commerce among the States," no state rate law is valid whose direct and necessary effect is to interfere with or obstruct the free flow of such current existing at the time the law was passed.

The expression "current of commerce among the States" suggests a graphic illustration based upon the assumption of a system of transportation canals, built by the Federal government, running from one end of the country to the other and passing through

the various States. Assume, further, that each State had a system of canals for the purpose of handling its local traffic intercepting those of the nation. As long as the channels of the state canals are of the same depth as those of the nation, the free flow of water through both would be uniform and uninterrupted, but if the channels of the state canals should be deepened and lowered, the water would immediately and inevitably rush to the lower level, and if similar action should be taken by all the States, the government canals would soon be dry, and the state canals alone have water.

The same is the case with "the current of commerce." It irresistibly seeks the lower level of rates, and if these be prescribed by the several States, the supremacy of national control is destroyed.

In *United States* v. *Rio Grande Dam Irrigation Company*, 174 U. S., 690, this court expressly decided that the United States may prevent interference with a stream not navigable but which is tributary to a navigable stream, in order to preserve the navigability of the stream to which it is tributary.

In the case of *Railroad Company* v. *Maryland*, 21 Wall., 456, decided at the October term, 1874, upon which counsel for the State rely and from which they quote that "no doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and its spirit embrace commerce by land as well," the following

further quotations are interesting and instructive, in view of the tremendous development since in railway transportation, the subsequent passage of the interstate commerce act and the amendments of 1906 and 1910, and particularly in view of the more recent decisions of this court, hereinafter cited, in cases analogous to those at bar:

> "It is often difficult to draw the line between the power of the State and the prohibitions of the Constitution. Whilst it is commonly said that the State has absolute control over the corporations of its own creation, and may impose upon them such conditions as it pleases; and like control over its own territory, highways, and bridges, and may impose such exactions for their use as it sees fit; on the other hand, it is conceded that it cannot regulate or impede interstate commerce, nor discriminate between its own citizens and those of other States prejudicially to the latter.
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> * * * * *
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> It can hardly be supposed that individual States, as far as they have reserved, or still possess, the power to interfere, will be so regardless of their own interest as to allow an obstructive policy to prevail. If, however, state institutions should so combine or become so consolidated and powerful as, under cover of irrevocable franchises already granted, to acquire absolute control over the transportation of the country, and should exercise it injuriously to the public interest, every constitutional power of Congress would undoubtedly be invoked for relief. *Some of the States are so situated as to put it in their power, or that of their transportation lines, to interpose formidable obstacles to the free movement of the commerce of the country.* Should any such system of exactions be established in these States, as materially to impede the passage of produce,

merchandise, or travel, from one part of the country to another, it is hardly to be supposed that the case is a *casus omissus* in the Constitution. Commercially, this is but one country, and intercourse between all its parts should be as free as due compensation to the carrier interest will allow. This is demanded by the 'general welfare,' and is dictated by the spirit of the Constitution at least. Any local interference with it will demand from the National legislature the exercise of all the just powers with which it is clothed."

With the facts shown in the cases at bar, and the present state of federal legislation, the doctrine of this very case distinctly supports the contention of the railroads.

III.

THE POWER OF THE STATE OVER LOCAL RATES WAS UNQUESTIONED IN THE EARLY HISTORY OF RAILWAY TRANSPORTATION WHEN RAILROADS OPERATED WITHIN THE LIMITS OF THE STATE WHICH CREATED THEM AND ALL TRAFFIC WAS INTRASTATE. BUT THAT POWER HAS BEEN NECESSARILY CURTAILED BY THE DEVELOPMENT OF THE RAILWAY SYSTEMS, THE LEGISLATION OF CONGRESS, THE GROWTH OF COMMERCE AMONG THE STATES AND THE METHOD OF HANDLING ALL COMMERCE INDISCRIMINATELY ON THE SAME TRAINS, WHETHER INTRASTATE OR INTERSTATE, SO THAT WHENEVER LOCAL RATES DIRECTLY AFFECT INTERSTATE RATES THE NATIONAL AUTHORITY IS SUPREME AND STATE REGULATION IS SUPERSEDED.

This is particularly the case since the passage of the interstate commerce act of 1887 and especially since the amendments of 1906 and 1910.

As decided in the recent *Reid* case, 222 U. S., 424, by that act Congress has occupied the rate field. The great rail highways of commerce, traversing many States, as we have seen, are just as much under the control of Congress, under the power to regulate commerce, as its control over navigable streams, and like its control over navigable streams the power of Congress operates within the States as well as without, and extends to the regulation of all traffic passing over such highways, even if intrastate, which is directly connected with or bears any relation to interstate traffic. And this must necessarily be so.

The Interstate Commerce Commission has the duty imposed upon it of seeing that the rates charged by the railroads are reasonable, that is, reasonable not alone to the shipper but to the roads themselves as well. It acts upon complaints. It fixes rates. It prevents unjust discriminations. It forbids undue preferences. It is building up a just system of rates, free from such discriminations and preferences, by new adjustments or approval of those adopted by the roads. It provides a system of accounts, under authority of law, covering all railroad property, local or otherwise, showing receipts from all kinds of business, intrastate as well as interstate, and all expenses, so as to be able to ascertain whether the net income from all sources is sufficient to yield a fair return. The rates filed with the Commission have the force of law, binding upon both carrier and shipper, just as those established after hearing upon a complaint have the force of law for a limited

period. Then a state law is passed reducing rates in a State. The system is destroyed at once. Revenues are substantially reduced. The power of the Commission over rates and over the return which the carriers are entitled to receive is no longer supreme. Traffic by interstate rates which are higher than the statutory rates does not move by those rates but by the new local rates, after the state border is reached, and if between two termini in two different States the local rates are both lowered, the interstate rates, shown on tariffs filed with the Interstate Commerce Commission and having the force of law, binding upon the railroad, no longer move the traffic, but until the same are changed to conform and a new tariff is filed, the traffic is shipped locally and the same is moved under the local tariffs of each of the two States. Where railway systems run through many States, the separate action of each State will only intensify the disastrous result to interstate commerce and the destruction of its systematic regulation described in the case of two States only.

Such a situation is intolerable and its continuance and extension can only be effectually arrested by the decision of this Court.

The Commission, while recognizing the injustice of state action, in so far as it affects interstate commerce and the actual creation thereby of discriminations against such commerce, but declining to condemn such discriminations as necessarily unjust, will only assert its power over all rates affecting such commerce when this Court decides that under

the commerce clause of the Constitution and the act to regulate commerce, in its present amended form, the whole field of commerce among the States and all the forces engaged therein are under its supervision and control.

In *Saunders et al.* v. *Southern Express Company*, 18 I. C. C. Rep., 415, Mr. Commissioner Harlan said on page 421:

> "While upon general principles of comity the action of a state commission in fixing a rate on state traffic must be treated with all due respect, this Commission has never felt itself bound to accept a state-made rate as a necessary measure of an interstate rate. In *Hope Cotton Oil Co.* v. *Texas & Pacific Ry. Co.*, 12 I. C. C. Rep., 265, 269, we said:
>
> 'While a rate fixed by a state statute or a state commission is naturally and properly entitled to respectful consideration, it has no greater sanctity, as applied to interstate traffic, than a rate established by a railroad company, and we should not hesitate, upon proper evidence that a rate so established would be unjust either to a carrier or to a shipper, to refuse to accept it is a basis for fixing an interstate rate.'
>
> That rule has been followed in other cases and must necessarily always be the basis of our action when dealing with interstate rates. To depart from that course would amount to an abandonment of our duties under the law and would result in the fixing of interstate rates by state commissions. We do not know what evidence was before the state commission when these rates on fresh fish were ordered into effect in Alabama, and are not to be understood, therefore, as criticising that body for its action in this regard. But from what has been said it is clear that, with all the light on the ques-

tion that the record and our own investigations give us, we can not accept the Alabama rates as a fair basis for fixing the defendant's rates to the same points from Pensacola. To do so would be to require the defendant to receive for that service less than seems to us to be reasonable compensation. Nor, in view of the protest of the defendant against the action of the state commission and of its efforts before that body to secure a withdrawal or modification of the order, may the defendant fairly be held responsible for the resulting discrimination. The relation of rates thus produced was neither voluntary nor the consequence of any uncontrolled action on its part; the continuance of the relation thus created is not in any sense attributable to the defendant unless it may be said that the defendant is under an obligation to correct the discrimination by voluntarily reducing its Pensacola rates to the basis of the Mobile rates. Substantially such a state of facts was presented in the proceeding entitled In the Matter of Freight Rates between Memphis and Points in Arkansas, 11 I. C. C. Rep., 180, 209, and the Commission found in the record no grounds upon which the carrier could be held at fault for a discrimination arising under similar conditions. Moreover, as the defendant's state rates are held down under the compulsion of an order by the state commission, an order by this Commission requiring it to cease and desist from the resulting discrimination against Pensacola would be equivalent to an order requiring the defendant to reduce its Pensacola rates to the level of the state rates out of Mobile. Such an order we are not prepared to enter, at least at this time and as now advised."

Dealing with the difficulty raised by the facts, Mr Harlan continues, on page 422:

"The carriage of traffic by a common carrier for one community or one set of shippers at less than it carries the same traffic for a like distance, and under substantially similar transportation conditions, for another community or another set of shippers is not only in contravention of fundamental right and justice but is essentially iniquitous. If such a discrimination is practiced by a common carrier as between communities or different sets of shippers within the same State and on traffic moving only within the State, redress may usually be had under the state laws. On the other hand, if an interstate carrier is guilty of such a discrimination with respect to interstate traffic, redress may be had under the act to regulate commerce. But when a carrier, as in this case, serves two communities similarly situated, by hauling the same traffic under similar conditions from a point of origin to destinations in the same State and also to the same destinations from an interstate point of origin, it is not altogether clear that existing legislation affords redress against a discrimination, as between the two points, when resulting from an order by the state commission. But unless some such power is lodged somewhere under appropriate legislation, it is evident that state-made rates, if established in pursuance of a narrow or selfish local policy, may not only hinder and harm and burden interstate traffic and interstate interests, but may, if adjusted with that end in view, take from a point in another State a business that naturally belongs to that point or in which it is entitled at least to participate, on the basis of equal rates and equal opportunity. Whatever may be the explanation, whether it rests in the greater zeal, activity, and ability of the fishing interests at Pensacola or whether it is a natural advantage belonging to that port, the fact appears that for years Pensacola has enjoyed a larger

business in the distribution of fish throughout the State of Alabama than has Mobile. By a readjustment of the state rates out of Mobile, whether so intended or not, the process of taking from Pensacola, through lower state-made transportation charges, what its superior zeal or its greater natural advantages have given to it has commenced and is now going on.

The defendant is one concern and one instrument of commerce operating through and across those invisible lines that separate the several States from one another. It has but one corps of officers and employes and but one equipment. Its only object is to serve all the shippers in the territory through which it passes. That object is legitimately effected only when it serves its whole constituent public upon substantially similar terms when the conditions are substantially similar. If it voluntarily makes a distinction between traffic that moves from a point in one State to a point in another State and traffic that moves between points in the same State, and gives to the state traffic lower rates than to the interstate traffic moving under substantially similar conditions, it imposes upon the latter a burden that it ought not justly to bear, and it discriminates against one community in favor of another. The same burden and discrimination follow if instead of voluntarily so adjusting its rates it is compelled so to adjust them by the action of a state commission. It may be that this anomaly in transportation necessarily results from our dual system of government and that a remedy is beyond reach without some amendment to the national constitution. On principle it is clear that a carrier operating through two or more States is but one vehicle of commerce, and all traffic moved by it, whether state or interstate, ought, when the general transportation conditions are the same, to bear its just proportion of the cost

of operation and ought to yield no more and no less than its just proportion of the revenues of the carrier. Any other theory is fundamentally inequitable, illogical, and unreasonable.

It may be, but on that point we express no opinion, that the Congress may constitutionally protect interstate commerce, as well as the carriers that are engaged in interstate transportation, by requiring that any state traffic moved by such a carrier shall bear its just proportion of the cost of operation and yield its proper proportion of profit to the carrier; and that with such an end in view it may authorize this Commission to fix minimum rates, at least, for state traffic when moved by carriers engaged also in interstate transportation; or that it may provide that no carrier engaged in the interstate transportation of passengers or property may at the same time carry state traffic at rates that are less than the rates exacted by it for interstate carriage of like distance and under like transportation conditions."

We respectfully submit that to remedy the evil effects resulting from state-made rates upon interstate commerce, the Interstate Commerce Commission under the act, in its present broadly amended form, should be adjudged to be fully equal, without the necessity of additional legislation by Congress.

The Interstate Commerce Commission, as incident to its powers under the act, in order to preserve the necessary unity of control and require state traffic to bear its just proportion of the cost of operation and yield its proper proportion of profit to the carrier, should be held to have the present right, in the language of the Commission, "to fix minimum rates, at least, for state traffic when moved by carriers engaged also in interstate transporta-

tion," or, which is the same in effect, to "provide that no carrier engaged in the interstate transportation of passengers or property may at the same time carry state traffic at rates that are less than the rates exacted by it for interstate carriage of like distance and under like transportation conditions."

As well said by the Master in the Minnesota case:

> "It must be true that there cannot be a dual control in so important a regulation as the fixing of rates, *the same being of vital importance to the continued existence of the company as a going concern*, and if state and interstate rates must bear a certain relation to each other, the standard must be fixed by the sovereign power, the Congress, which under the Constitution is given power to regulate commerce among the States. A power enumerated in the Constitution, with all the incidents thereof, is supreme and cannot be in any manner limited by state action."

IV.

EVERY STATE LAW, REGARDLESS OF THE PURPOSE FOR WHICH IT WAS PASSED, WHOSE DIRECT AND NECESSARY EFFECT IS SUBSTANTIALLY TO INTERFERE WITH INTERSTATE COMMERCE, IS VOID.

The learned Judge below, after finding such interference as a matter of fact, was clearly wrong in his legal conclusion that the Missouri statutes must have been passed for the express purpose of attempting to regulate interstate commerce or have been adjudicated by the courts of the State as applicable thereto before they could be declared void on account of interfering therewith.

For example, he says, in the opinion (Rec., 5288-92):

> "Upon their face the statutes in question are with reference only to state commerce. * * * I have searched diligently but find no case decided by the supreme court declaring a state statute void that did not in some form and in some manner place a burden on, or in some way hamper or obstruct, commerce from or to another State."

In commenting upon the *Eubank* case (184 U. S., 27) and the case of *Wabash, etc., R. R.* v. *Illinois* (118 U. S., 557), he makes their applicability depend upon the fact that the decisions of the supreme courts of Kentucky and Illinois, respectively, "had so ruled as to read into the statute the objectionable feature" of direct interference with interstate commerce. He then adds:

> "But the Missouri courts have not so construed these statutes of the State. When they do so decide, then the Eubank and Illinois cases will be the precedents to thwart such legislation as thus construed."

After commenting upon the case of *Hall* v. *DeCuir* (95 U. S., 485), in a somewhat similar vein, he announces his legal conclusions upon the subject as follows:

> "The state statute in order to be declared void, must by its terms and recitals interfere with commerce to or from another State, or the statute by construction given it by the highest court of the State must so operate in its results. But here we have no such recitals in the statute, and it has not been so declared to mean by the Missouri courts."

That Judge McPherson was wrong in his conclu-

sions of law upon the facts found by him is firmly established by the decisions of this court:

Western Union Telegraph Co. v. *Kansas*, 216 U. S., 1, reviews all the authorities as to when state law affects interstate, and the conclusion reached is thus stated by Mr. Justice Harlan:

> "But it is said that none of the authorities cited are pertinent to the present case, because the State *expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce*, but seeks only to prevent the telegraph company from entering the field of domestic business in Kansas without its consent, and without conforming to the requirements of its statute. But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. *This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things.* Such is an established rule of constitutional construction, as the adjudged cases abundantly show."

The learned justice then proceeded thus to review the cases:

> "In *Henderson* v. *New York* (*Henderson* v. *Wickman*), 92 U. S., 259, 268, 23 L. Ed., 543, 547, which involved the question whether a statute of New York was, in any real sense, a regulation

to commerce with foreign nations, the court said that, *in whatever language a statute may be framed,* its purpose must be determined by its natural and reasonable effect. In *Mugler* v. *Kansas,* 123 U. S., 623, 661, 31 L. Ed., 205, 210, 8 Sup. Ct. Rep., 273, it was said that the courts, when determining whether a statute is consistent with the fundamental law, must not deem themselves '*bound by mere forms, nor are they to be misled by mere pretenses.* They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.' In *Lyng* v. *Michigan,* 135 U. S., 161, 166, 34 L. Ed., 150, 153, 3. Inters. Com. Rep., 143, 10 Sup. Ct. Rep., 725, it was adjudged that a State could not lay a tax on interstate commerce 'in any form whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.' In *Robbins* v. *Taxing Dist.,* 120 U. S., 489, 497, 30 L. Ed., 694, 697, 1 Inters. Com. Rep., 45, 7 Sup. Ct. Rep., 592, it was attempted to support a local regulation about drummers upon the ground that no discrimination was made between domestic and foreign drummers,—that they were all taxed alike. But that device or form of taxation did not prevail, the court saying: 'That does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the State.' In *Minnesota* v. *Barber,* 136 U. S., 313, 319, 326, 34 L. Ed., 455, 457, 460, 3 Inters. Com. Rep., 165, 10 Sup. Ct. Rep., 862, the particular statute there assailed as repugnant to the Constitution of the

United States was not saved by the fact that it was applicable to citizens of all the states, including citizens of the State which enacted it. This court said: 'There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, *by its necessary operation*, be destructive of rights granted or secured by the constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.' It was further said in that case 'that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.'

In *Brimmer* v. *Rebman*, 138 U. S., 78, 81, 34 L. Ed., 862, 863, 3 Inters. Com. Rep., 485, 11 Sup. Ct. Rep., 213, the questions arose as to the validity of a Virginia statute making it unlawful to offer for sale, within the limits of that State, 'any fresh meats (beef, veal or mutton) which shall have been slaughtered 100 miles or over from the place at which it is offered for sale until and except it has been inspected and approved' as provided in the statute. The preamble of the statute recited that unwholesome meats were being offered for sale in Virginia. Such recitals was held not to conclude the question as to the conformity of the statute with the constitution. Despite the avowal by the State that its object, by the statute, was to prevent the offering of unwholesome meats for sale in Virginia, this court adjudged it to be unconstitutional saying: 'Is the statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the constitution?

This question admits of but one answer. * * * The fees exacted under the Virginia statute for the inspection of beef, veal and mutton, the product of animals slaughtered 100 miles or more from the place of sale, are, in reality, a tax; and 'a discriminating tax, imposed by a State, operating to the disadvantage of the products of other States when introduced into the first-mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the powers conferred by the constitution upon the Congress of the United States.' *Walling* v. *Michigan*, 116 U. S., 446, 455, 29 L. Ed., 691, 694, 6 Sup. Ct. Rep., 454. Nor can this statute be brought into harmony with the constitution by the circumstances that it purports to apply alike to the citizens of all the States, including Virginia; for 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statutes.' *Minnesota* v. *Barber*, 136 U. S., 313, 319, 34 L. Ed., 455, 457, 3 Inters. Com. Rep., 185, 10 Sup. Ct. Rep., 862; *Robbins* v. *Taxing Dist.*, 120 U. S., 489, 497, 30 L. Ed., 694, 697, 1 Inters. Com. Rep., 45, 7 Sup. Ct. Rep., 592. If the object of Virginia had been to obstruct the bringing into that State, for use as human food, of all beef, veal and mutton, however wholesome, from animals, slaughtered in distant State, that object will be accomplished if the statute before us be enforced."

In *Galveston, H. & T. R. Co.* v. *Texas*, 210 U. S., 217, 227, Mr. Justice Holmes says:

"Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as

to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

In *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S., 162, the court says:

"According to well-settled rules of statutory construction, the validity of a statute, whatever its language, must be determined by its effect or operation, as manifested by the natural and reasonable meaning of the words employed. *Henderson* v. *Mayor of New York*, 92 U. S., 259, 268 (23 L. Ed., 543). If a statute by its necessary operation really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although the state legislature may not have intended to enact an invalid statute."

V.

THE COMPELLING FORCE OF COMPETITION IN THE ADJUSTMENT OF INTERSTATE RATES TO MEET STATE-MADE RATES DEMONSTRATES THE DIRECT EFFECT OF SUCH RATES UPON INTERSTATE COMMERCE.

With present transportation conditions and in view of the law as it stands, it cannot be successfully contended that meeting the competition of state-made rates is a voluntary, intervening act, making such effect indirect.

Upon the Railways Companies' offering the testimony on the necessary effect of state-made rates to reduce interstate rates, particularly as to the situation between Kansas City and Joplin, the following

objection was made by counsel for the State and overruled by the court (Rec., 4039-40):

> "Mr. Ladd: We wish to note an objection to this testimony, simply that your Honor may know the position we take about it, because it may have the result to reduce interstate rates, any rate put in force by our legislature cannot be considered here as a matter of law. If the railroad companies choose, from considerations of convenience or in view of competitive conditions, to reduce their interstate rate, because the State has fixed rates, that is a matter with which we have nothing to do.
>
> Mr. Hagerman: What we say about it is, that if a state rate directly affects interstate commerce, then the state rate must fall, and the object of the proof is to prove that it does directly affect it, and necessarily so."

Competition is a distinct and most important factor in the making and adjustment of rates. As a vital force in transportation, it is controlling and irresistible if traffic is to be transported by a given line between points where there are other transportation lines, either rail or water.

The law of competition is just as forceful in commerce as the law of gravitation is over matter.

To obey the law of competition is but following out in commerce the law of self-preservation when applied to human life, for a failure to recognize and obey it means a loss of business, a reduction of revenue, an impairment in value of property, which carried to its last analysis means bankruptcy, which is commercial death.

The several anti-trust statutes, federal and state, were passed for the express purpose of preserving

the free and full operation of the law of competition. They provide civil and criminal penalties for those who combine to stifle it.

The act to regulate commerce fosters competition and this court, in numerous rate decisions, has recognized its potential force.

In *Interstate Com. Commiss.* v. *B. & O. Railroad*, 145 U. S., 263, the court says on page 276:

> "The principal objects of the interstate commerce act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road."

In *Cin., N. O. & Tex. Pac. Railway* v. *Int. Com. Com.*, 162 U. S., 184, the question at issue on the appeal of the Commission was whether the rate of $1 per hundred pounds from Cincinnati to Atlanta fixed by the Commission should be sustained or whether the rate of $1.07 theretofore charged by the railroads should continue in force.

The railroad companies defended on the ground that, as stated by the court on page 195, "the rate charged to Atlanta, namely, $1.07 per hundred

pounds, was fixed by active competition between various transportation lines, and was reasonably low." The courts below found for the railroad companies on this issue, and their judgment was affirmed by this court.

In the concluding paragraph of the opinion, the court adopts the view first announced by Mr. Justice Jackson, when Circuit Judge, in the case of *Interstate Com. Com.* v. *B. & O. Railroad Co.*, 43 Fed. Rep., 37, as follows:

> "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, *to adjust and apportion their rates so as to meet the necessities of commerce,* and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

In *Int. Com. Com.* v. *Alabama Midland Ry.*, 168 U. S., 144, the court says on pages 164-5:

> "That competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce, has been held by many of the Circuit Courts. It is sufficient to cite a few of the number: *Ex parte Koehler,* 31 Fed. Rep., 315; *Missouri Pacific Railway* v. *Texas & Pacific Railway,* 31 Fed. Rep., 862; *Interstate Com. Com.* v.

Atchison, Topeka, &c., Railroad, 50 Fed. Rep., 295; *Same* v. *New Orleans & Texas Pacific Railroad*, 56 Fed. Rep., 925, 943; *Behlmer* v. *Louisville & Nashville Railroad*, 71 Fed. Rep., 835; *Int. Com. Com.* v. *Louisville & Nashville Railroad*, 73 Fed. Rep., 409.

In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered; and that a preference or advantage thence arising is not necessarily undue or unreasonable. *Denaby Main Colliery Co.* v. *Manchester, Sheffield & Lincolnshire Railway*, 11 App. Cas., 97; *Phipps* v. *London & North Western Railway*, 2 Q. B. D., 1892, 229.

But the question whether competition as affecting rates is an element for the commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court."

And again the court says on page 170:

"Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether, upon the evidence in the present case, the courts below erred in dismissing the interstate commerce commission's complaint."

The judgment of the lower courts was affirmed.

In *Louisville, &c., Railroad Co.* v. *Behlmer*, 175

U. S., 648, the court, after reviewing the decisions, says on pages 670-2:

> "What was decided in the previous cases was that under the fourth section of the act substantial competition which materially affected transportation and rates might under the statute be competent to produce dissimilarity of circumstances and conditions, to be taken into consideration by the carrier in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind of competition could be considered and not another kind, but that all competition, provided it possessed the attributes of producing a substantial and material effect upon traffic and rate making, was proper under the statute to be taken into consideration. Indeed, if the distinction contended for were sound it would follow that the greater and more material competition would be without weight in determining whether a dissimilarity of circumstances and conditions existed, whilst the lesser competition would be potential for such purpose. Not only this, but if the distinction be applicable, only that competition which might deflect, at the point of origin, the traffic from one carrier to another would be within the purview of that portion of the fourth section now under consideration, and competition which was so great as to absolutely prevent the movement of the traffic, unless the lesser rate was exacted, would be outside of its operation. This would lead to the construction that the statute, in empowering a carrier, under certain competitive conditions, of his own volition, to exact a lesser rate for the longer haul, contemplated only the interest of some particular carrier and not at all the public interest. Whilst the unsoundness of the proposition is thus shown, from the contradiction which inheres in it, the erroneous conception upon which it rests is fully demonstrated in the

following excerpt from the opinion in *Texas & Pacific Railway* v. *Interstate Commerce Commission, supra*, 211:

'So, too, it could not readily be supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation.'

Indeed, in the cases by which the controversy here before us is controlled, attention was pointedly called to the fact that in considering the power of the carrier, of his own motion, to charge a lesser sum for the longer haul, not only was the interest of the carrier to be taken into account, but also the interest of the public, especially at the place from which the traffic moved and the place to which it was to be delivered, and to these principles we shall before concluding again advert."

Again the court says on pages 674-5:

"It follows that whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First. The absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition. Second. That the competition relied upon be, not artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making, the right in every event

to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered."

In *East Tenn., &c., Ry. Co.* v. *Interstate Com.*, 181 U. S., 1, the court says on pages 18-19:

"The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it. * * * The commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines."

Again the court says on page 20:

"To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public."

In *Louisville & Nashville Rd. Co.* v. *Eubank*, 184 U. S., 27, where was involved the validity of the Kentucky constitutional provision making it unlawful for a carrier to charge more for a shorter haul than for a longer haul, under similar conditions, the shorter haul being included in the longer, it appeared that the rate from Nashville, Tennessee, to Louisville, Kentucky, was made lower than the rate charged for the shorter haul from Franklin, Kentucky, to Louisville on account of *water competition.*

The court held the lower rate to be lawful and the constitutional provision void as a regulation of interstate commerce, saying in the opinion as to the compelling force of competition:

> "There is also a rate for the transportation of tobacco from Nashville to Louisville of 12 cents per one hundred pounds, and *that rate is arrived at because of water competition between the two points which absolutely prevents the company from making a greater charge for if it did it would get no business.*
>
> * * * * *
>
> It seems also to be thought that there is no regulation of commerce, provided it is not interfered with or regulated in all ways by which transportation of commodities between interstate localities may be accomplished; that if the commodity (tobacco in this case) can be transported by any other means or route, or by any other individual or corporation than the one affected by the regulation, commerce is not regulated within the constitutional meaning. On the contrary, it seems quite clear that any law which in its *direct result regulates the interstate transportation of a single individual carrier, or company of carriers, violates the provision in question;* that it is no answer to say the commodity can still be transported by another carrier or by

water instead of rail, so long as the direct effect of the state legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or by a particular individual or company."

In *Northern Securities Company* v. *United States*, 193 U. S., 197, the court says on pages 337, 338:

"Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

* * * * *

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in *United States* v. *Joint Traffic Association:* 'Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be

legal which shall restrain trade and commerce by shutting out the operation of *the general law of competition?* We think it has.' "

In *Interstate Comm. Comm.* v. *Chicago G. W. Ry.*, 209 U. S., 108, Mr. Justice Brewer, in announcing the unanimous decision of the court, after referring with approval to that part of the opinion of Mr. Justice Jackson when Circuit Judge in *Int. Com. Com.* v. *B. & O. R. R. C.*, 43 Fed. Rep., 37, 50, quoted in *Int. Com. Com.* v. *Ala. Mid. R. R. Co.*, 168 U. S., 144, 172, as hereinbefore set forth, says on pages 119-20:

"It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to a change of rates in the manner provided in the interstate commerce Act—*Armour Packing Co.* v. *The United States, ante,* p. 56, and also that in fixing their own rates they may take into account competition with other carriers, provided only that the competition is genuine and not a pretense. *Int. Com. Com.* v. *B. & O. R. R. Co.*, 145 U. S., 263; *T. & P. Ry. Co.* v. *Int. Com. Com.*, 162 U. S., 197; *Int. Com. Com.* v. *Ala. Mid. Ry. Co., supra; L. & N. R. R. Co.* v. *Behlmer,* 175 U. S., 648; *East. Tenn., etc., Ry. Co.* v. *Int. Com. Com.*, 181 U. S., 1; *Int. Com. Com.* v. *L. & N. R. R. Co.*, 190 U. S., 273."

Again, the court says on pages 121-2:

"With reference to competition we have referred to the cases in this court in which that matter has been considered. According to the fourth finding the rates in question given to the packers at the Missouri river and St. Paul were the result of competition. Without recapitulating all the facts disclosed in that finding it is enough to say that the Chicago Great Western Railway Company, which had the long-

est line from Chicago to Missouri river points, made a reduction in the rates, and did this, as its president testified, 'for the purpose of securing a greater proportion of the traffic in the products of live stock than it had been previously able to obtain.' That is one of the facts inducing competition, and one of the results expected to flow from a reduction of rates. It certainly of itself deserves no condemnation. In order to secure to themselves what was likely to be transferred to the Great Western by virtue of its reduction of rates, the other companies also made a reduction and, as shown by the fifth finding, the competition was not the result of agreement, but was an 'actual, genuine, competition.' "

In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S., 42, the court says on page 48:

"The Union Pacific made the allowances in question to elevators at its termini; it had no motive to make them anywhere else. The competitors of the Union Pacific concerned in the Diffenbaugh case were compelled by competition to make the same allowance at Missouri river points, but they also make it nowhere else. The Traffic Bureau and Merchants' Exchange of St. Louis, complained to the Commission that the result was a discrimination against St. Louis of three-fourths of a cent per 100 pounds. But the principle of the decision is that the allowance to elevators upon their own grain is to be stopped everywhere unless they are prevented from using the opportunity for treating their grain. Therefore this question of preference between cities does not need to be discussed. But, as remarked below, the Union Pacific could not be complained of on this ground, 176 Fed. Rep., 424, and it would be impossible to deny the same right to competing roads, merely because as the result of the con-

ditions one city would gain and another lose. *Louisville & Nashville R. R. Co.* v. *Behlmer,* 175 U. S., 648."

In *Shepard* v. *Northern Pac. Ry. Co.,* 184 Fed., 765, Sanborn, J., says on pages 792-3:

"They (counsel for the defendants) say that, while the reduction of the local fares and rates may induce the companies to reduce their interstate rates and fares across the borders of the state to a parity with the local rates, this is the voluntary act of the companies not directly required by the laws and orders. There are, however, known and inexorable laws of commerce, and one of them is that transported articles will move at the lowest available rates. Reduce local fares and rates so that fares and rates in interstate commerce across the borders of the state are substantially higher than the sums of the locals over the Minnesota stations on or near the state boundaries and the companies must reduce their interstate fares and rates on that portion of their interstate commerce affected by the sums of the locals over the Minnesota borders to a substantial parity with the sums of the locals or their interstate commerce affected thereby will unavoidably become intrastate commerce and move at the sums of the locals. There is nothing voluntary on the part of the companies in the loss or burden imposed upon them by these reductions. That they must suffer whether they reduce their interstate rates or maintain them and permit the transformation of their affected interstate commerce into intrastate commerce by rebilling and local contracts so that it can pass at the sums of the locals. The loss of the difference in revenue between that derived from their former interstate rates and that derived from the sums of the locals is a direct and unavoidable burden upon their interstate commerce imposed

by the acts and orders stated which the companies may not by any device avoid."

In re Arkansas Rate Cases, 187 Fed. Rep., 290, cited by counsel for State, Trieber, J., while denying the railroads relief on the ground that the state commission rates interfered with interstate commerce, says in his opinion on page 296, that

"if the States of Arkansas, Texas and Missouri each enact a two-cent rate fare, it would be folly for a carrier to attempt to charge a higher rate for interstate or intrastate passengers in those states; for passengers would purchase tickets to the state line of each state at the reduced local rates, and thus defeat the higher interstate rates, although the state rates are by the statutes of these states limited to intrastate transportation solely."

Counsel for the State set great store upon the language of Brewer, Circuit Justice, in *Ames* v. *Union Pac. Ry. Co.,* 64 Fed., 165, 172 (1894), on this subject, quoted by Judge Sanborn, in the Minnesota case, 184 Fed., 765.

His comment thereon is as follows:

"Finally, counsel cite, to overcome the proof of the substantial burden and the direct regulation of interstate commerce effected by the acts and orders in this case, with which this record teems, these words from the opinion of Mr. Justice Brewer in *Ames* v. *Union Pacific Ry. Co.* (C. C.), 64 Fed., 172:

'Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true that the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates, and make them conform to the local rates prescribed by the statute; but

surely there is no legal compulsion. The statute of the state does not work a change in interstate rates, any more than an act of Congress prescribing interstate rates would legally work a change in local rates. Railroads cannot plead their own convenience, or the effect of competition between themselves and other companies, in restraint of the otherwise undeniable power of the State.'

The reduction of local rates does not interfere with interstate rates 'as a matter of law,' yet it may do so as a matter of fact. Whether or not the general and sweeping reductions in local rates in Minnesota necessarily interfere with interstate rates and interstate commerce is in this case, as it must be in every case, a question of fact. The facts which determine that question in this case have been set forth in this opinion at great length, because it is upon them, and not upon legal inferences, that the answer to the question, whether or not the effect of the necessary operation of the acts and orders challenged is substantially to burden interstate commerce, now rests. Those facts are that it was not for 'their own convenience,' but at great inconvenience and loss, not on account of the 'effect of competition between themselves and other companies,' but because these acts and orders, the prohibition of discrimination between localities by the interstate commerce act *and the laws of trade,* forced them to do so, that the defendants reduced their interstate commerce rates to a parity with the local rates and submitted to the loss of interstate revenue this action entailed. The opinion of Mr. Justice Brewer in the Ames case is inapplicable to the cases in hand because no such array of condemnatory facts was ever submitted to him in that case."

In addition to "the array of condemnatory facts" in the cases at bar, the court must consider the va-

rious amendments to the interstate commerce act, the great growth of commerce and the tremendous expansion and extension of railway systems since 1894, and the subsequent decisions of this court above cited, wherein the force of competition was judicially recognized, in many of which Mr. Justice Brewer participated, and the opinion in one of which (209 U. S., 108), he himself wrote.

In view of all of these considerations, the fact remains that where state-made rates compel interstate carriers by the irresistible power of competition to reduce their interstate rates to hold their business, such effect constitutes a direct interference with interstate commerce.

VI.

AN ANALYSIS OF CERTAIN ANALOGOUS CASES DECIDED BY THIS COURT SHOWS THAT THE DOCTRINE FOR WHICH WE CONTEND HAS ALREADY HAD EXPRESS JUDICIAL SANCTION.

The case of *The Daniel Ball,* 10 Wall., 557, is in point. In that case the entire transportation, independent of any connecting carriers, was within the State of Michigan from one point to another on Grand River, a river wholly within the State, although some of the goods transported were destined eventually for other States.

Counsel for The Daniel Ball used this language in the concluding paragraph of his brief (p. 562):

> "It seems clear, therefore, that this steamer was engaged exclusively in domestic trade. If

it was not, there is no such thing as the domestic trade of a State, and Congress may take jurisdiction of the whole commerce of the country. Railroads entirely within a State, which transport grain or fruit destined eventually to a distant market, may be subjected to police regulations from Congress."

The court says on page 563:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

On page 564, the court quotes with approval the following passage from *Gilman* v. *Philadelphia,* 3 Wall., 724:

"The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress."

Again the court says on pages 565-6:

"It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market.

We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to

express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. *If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter.*"

The power of the State, therefore, to regulate its local commerce must yield to all the powers of Congress in respect to the regulation of interstate commerce. When, by virtue of geographical situation or economic conditions, a regulation by a State of its local commerce directly affects and interferes with interstate commerce, the act of regulation by the State is void because it is an invasion of powers vested exclusively in Congress. The power of a State to regulate its local commerce is, therefore, subject to the limitation that, in its exercise, interstate commerce be not directly affected or controlled.

The case of *Hall* v. *DeCuir*, 95 U. S., 485, is identical in principle with the cases at bar. There a statute of Louisiana was involved, according equal ac-

commodations to local passengers, regardless of color, and requiring carriers of passengers to comply therewith, and giving a right of action for damages upon refusal.

> Benson, of whose estate Hall was administratrix "was the master and owner of the 'Governor Allen,' a steamboat enrolled and licensed under the laws of the United States for the coasting trade and plying as a regular packet for the transportation of freight and passengers between New Orleans, in the State of Louisiana, and Vicksburg, in the State of Mississippi, touching at the intermediate landings both within and without Louisiana, as occasion required. The defendant in error, plaintiff below, a person of color, took passage upon the boat, on her trip up the river from New Orleans, for Hermitage, a landing-place within Louisiana, and being refused accommodations, on account of her color, in the cabin specially set apart for white persons, brought this action in the Eighth District Court for the Parish of New Orleans, under the provisions of the act above recited, to recover damages for her mental and physical suffering on that account. Benson, by way of defense, insisted, among other things, that the statute was inoperative and void as to him, in respect to the matter complained of, because, as to his business, it was an attempt to 'regulate commerce among the States,' and, therefore, in conflict with Art. 1, Sect. 8, Par. 3, of the Constitution of the United States."

The trial court awarded $1000 damages, which was affirmed by the supreme court of the State.

In reversing the judgment, this court says:

> "For the purposes of this case, we must treat the act of Louisiana of Feb. 23, 1869, as requiring those engaged in interstate commerce to give all persons traveling in that State, upon

the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts. It is with this provision of the statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the States."

Again the court says on pages 488-90:

"But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

It was to meet just such a case that the commercial clause in the Constitution was adopted.

The river Mississippi passes through or along the borders of ten different States and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. * * * We think this statute, to the extent that it requires *those engaged in the transportation of passengers among the States* to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress and not from the States."

In the cases at bar, the carriers are engaged in the transportation of freight and passengers among

the States. Local freight and local passengers are carried on the same trains with interstate freight and interstate passengers just as Mrs. DeCuir, a local passenger, was carried on the same boat with interstate passengers. As the Louisiana regulation in the DeCuir case, even when applied to a local passenger, necessarily affected the interstate passengers on the same boat, and was declared void by reason thereof, so the rates prescribed by Missouri for local traffic on a railroad necessarily affect the rates for interstate traffic on the same road, and the Missouri law should likewise be declared void, because they both fall within the commerce clause of the federal Constitution.

In *Wabash, &c., Railway Co.* v. *Illinois,* 118 U. S., 557, the court, after quoting part of the foregoing language from *Hall* v. *DeCuir* (95 U. S., 485), says on pages 572-3:

> "The applicability of this language to the case now under consideration, of a continuous transportation of goods from New York to Central Illinois, or from the latter to New York, is obvious, and it is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi River. It is not the railroads themselves that are regulated by this act of the Illinois Legislature so much as the charge for transportation, and, in language just cited, if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily

seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. 'It was,' in the language of the court cited above, 'to meet just such a case that the commerce clause of the Constitution was adopted.'

It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. *Cook* v. *Pennsylvania*, 97 U. S., 566, 574; *Brown* v. *Maryland*, 12 Wheat., 419, 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

The principles announced in *L. & N. R. R. Co.* v. *Eubank*, 184 U. S., 27, are absolutely decisive of the cases at bar. In that case, this court passed upon the question of the validity of a constitutional provision of the State of Kentucky regulating rates for the transportation of merchandise within that State.

The Kentucky provision was to the effect that it

was unlawful for a carrier to charge more for a shorter haul than for a longer haul, under similar conditions, the shorter haul being included in the longer. The Louisville & Nashville Company charged for the transportation of tobacco from Nashville, Tenn., to Louisville, Ky., twelve cents per one hundred pounds, while it charged for like transportation from Franklin, Ky., to Louisville in the same State, twenty-five cents per hundred pounds. Franklin was a station on the line of the company between Nashville and Louisville. The Kentucky court held that the act of the company in charging more from Franklin to Louisville than from Nashville to Louisville, violated the constitutional provision.

It appeared that the lower rate from Nashville to Louisville was due to water competition; that unless tobacco was carried at a twelve-cent rate between those cities, the railroad could not get the business.

In the opinion, this court referred to the foregoing facts and said (p. 40):

> "Is it an answer to this statement to say that the company can get this business by lowering its rates within the State to the same rate as charged from Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the State? If it be, is not the law which accomplished this result a direct interference by the State with interstate commerce? And if it do not lower its State rates and in consequence must raise its interstate rates in order to make its state rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result, a regulation in effect by the State of that commerce which ought to be free therefrom?"

The court held the constitutional provision invalid because it amounted to a regulation of interstate commerce, whether its effect was to compel the carrier to lose interstate commerce or its effect was to compel the carrier to readjust its interstate rates with reference to the local rates within the State. The opinion clearly states the standards by which it determined that the provision in question effected a direct regulation of commerce, as follows:

> "1. We fully recognize the rule that the effect of a state constitutional provision or of any state legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated. and in that event the effect of the provision is direct and important and not a mere incident. (p. 36.)
>
> 2. But the fact which vitiates the provision is that it compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State, thus enabling the State by constitutional provision or by legislaion to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier. which power of regulation the Constitution of the United States gives to the Federal Congress. (p. 41.)
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> 3. It seems also to be thought that there is no regulation of commerce. provided it is not interfered with or regulated in all ways by which transportation of commodities between interstate localities may be accomplished; that if the commodity (tobacco in this case) can be trans-

ported by any other means or route, or by any other individual or corporation than the one affected by the regulation, commerce is not regulated within the constitutional meaning. On the contrary, it seems quite clear that any law which *in its direct result regulates the interstate transportation of a single individual carrier, or company of carriers, violates the provision in question;* that it is no answer to say the commodity can still be transported by another carrier or by water instead of rail, so long as the direct effect of the State legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or by a particular individual or company." (pp. 41-2.)

It may be said that the conclusion reached confines the powers of States over railroad rates within narrow limits. This may be admitted, but it in no wise affects the soundness of the argument or the correctness of the conclusion. That this effect of the application of the principles announced in the Eubank case was before the court and fully understood when the case was decided is evident from the sentence in the dissenting opinion filed in that case by Mr. Justice Brewer for himself and Mr. Justice Gray. In the dissenting opinion, it is said (p. 47):

> "It does not seem to me that much is left of state control over local rates."

In the same dissenting opinion of Mr. Justice Brewer it is stated on page 45 that "the amount of tobacco which the defendant shipped from Nashville to Louisville between February 23 and July 15 was 12 hogsheads, weighing 20,910 pounds, and paying $25.09 freight."

Hence, it follows that the question of state inter-

ference with interstate commerce as the necessary result of state legislation is not dependent upon either the amount of traffic or the amount of revenue involved, but whether the effect of such legislation thereon is a direct interference with or burden thereon at all. If it is, the state legislation is void under the commerce clause of the Constitution. Where the traffic affected is great in volume and the revenue therefrom is large, the inherent invalidity in the state legislation is only intensified and accentuated.

If the three standards established by the court in the Eubank case be applied to the cases at bar, the Missouri statute must fall on the ground of its direct effect upon interstate commerce:

1. As we have seen, the necessary result of enforcing the statute "may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State."

2. Likewise, as we have seen, the statute "compels the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the State."

3. Finally, as we have seen, in the cases where there are state carriers and interstate carriers between two Missouri points, such as St. Joseph and Kansas City, St. Joseph and St. Louis and Kansas City and Joplin, the statute "in its direct result regulates the interstate transportation of a single carrier," as in the case of the Missouri Pacific between St. Joseph and St. Louis, "or company of carriers," as in the case of the several interstate

carriers between St. Joseph and Kansas City, and between Kansas City and Joplin, respectively.

The case of *Southern Railway Company* v. *The United States*, 222 U. S., 20, holds that the Act of Congress relative to safety appliances as enlarged by the amendatory one was "intended to embrace all locomotives, cars and similar vehicles used on any railroad which *is a highway of interstate commerce.*"

The court says:

> "Briefly stated, the case is this: The defendant, while operating a railroad which was 'a part of a through highway' over which traffic was continually being moved from one State to another, hauled over a part of its railroad, during the month of February, 1907, five cars, the couplers upon which were defective and inoperative. Two of the cars were used at the time in moving interstate traffic and the other three in moving intrastate traffic; but it does not appear that the use of the three was in connection with any car or cars used in interstate commerce. The defendant particularly objected to the assessment of any penalty for the hauling of the three cars, and insisted, first, that such a hauling in intrastate commerce, although upon a railroad over which traffic was continually being moved from one State to another, was not within the prohibition of the Safety Appliance Acts of Congress, and, second, that, if it was, those acts should be pronounced invalid as being in excess of the power of Congress under the commerce clause of the Constitution. But the objection was overruled, 164 Fed., 347, and error is assigned upon that ruling.
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> The act of March 2, 1903, 32 St., 943, Ch. 976, amended the earlier one and enlarged its scope

by declaring, *inter alia,* that its provisions and requirements should 'apply to all trains, locomotives, tenders, cars and similar vehicles used *on any railroad engaged* in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith.' * * *

The real controversy is over the true significance of the words 'on any railroad engaged' in the first clause of the amendatory provision. But for them the true test of the application of that clause to a locomotive, car or similar vehicle would be, as it was under the original act, the use of the vehicle in moving interstate traffic. On the other hand, when they are given their natural signification, as presumptively they should be, the scope of the clause is such that the true test of its application is the use of the vehicle on a railroad which is a highway of interstate commerce, and not its use in moving interstate traffic.

* * * * *

We come then to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect to vehicles used in moving intrastate traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way. Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the in-

terstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.

Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars were seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen and like employes, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other

trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others.

These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative."

Let us apply the principles of this case to the cases at bar:

The Atchison, Topeka and Santa Fe Railway, as a type of the railroads traversing Missouri, like the Southern Railway, is "a part of a through highway" over which traffic is continually being moved from one State to another, its road extending from Chicago through Illinois, Iowa, Missouri, Kansas, Colorado, New Mexico, Arizona and California, to the Pacific Ocean, and south from Kansas through Oklahoma and Texas to the Gulf of Mexico.

Like the act construed in the Southern Railway Company case, relative to safety appliances on "all trains, locomotives, tenders, cars and similar vehicles used *on any railroad engaged* in interstate commerce," the act to regulate commerce, in respect of the prescribing of reasonable rates and the prevention of unjust discriminations and undue preferences, applies *"to any common carrier or carriers engaged* in the transportation of passengers or property wholly by railroad * * * from one State * * * to any other State," etc.

Following still further the analogy of the Southern Railway case, we respectfully submit that the original interstate commerce act, as enlarged by the amendments of 1906 and 1910, ought to be held to embrace the regulation of all rates "used on any railroad

which is a highway of interstate commerce," and to exclude the regulation thereof by the States wherever there is "a real or substantial relation or connection between" the intrastate rates and the interstate rates, such as is shown in the record in these cases, or where, as is also shown by the record, there is "such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad as to make it certain" that the rates charged for the interstate traffic will be affected "in a real or substantial sense" by the direct and inevitable application of the intrastate rates thereto. "And this is so," to quote from the opinion in the Southern Railway Company case, "not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary" and competently may be exerted to regulate the rates of transportation therein of persons and property free from any control or interference "no matter what may be the source."

How peculiarly appropriate is this part of the concluding paragraph of the Safety Appliance case:

> "Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both,"

and, to paraphrase the remainder of the paragraph, the situation is much the same with regard to rates,

for rates applied by state law to intrastate traffic and by federal law to interstate traffic are not independent of each other but, in the cases at bar, are interdependent, so that whatever rate is prescribed by state authority necessarily affects the rates prescribed by federal authority.

Northern Pacific Ry. Co. v. *Washington*, 222 U. S., 370, is also distinctly applicable. That case involved the question as to whether the federal hours of service law superseded state legislation upon the subject, notwithstanding the federal act had not gone into effect at the time of the violation of the state law complained of. Mr. Chief Justice White, in announcing the unanimous opinion of the court, says:

> "The train, although moving from one point to another in the State of Washington, was hauling merchandise from points outside of the State destined to points within the State and from points within the State to points in British Columbia, as well as in carrying merchandise which had originated outside of the State and was in transit through the State to a foreign destination. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling. *Southern Railway Co.* v. *United States*, 222 U. S., 20."

The record herein showing that local traffic and interstate traffic are carried indiscriminately on all trains and that state-made rates necessarily affect interstate commerce, and thereby destroy the unity

of the system of rates either prescribed by the Interstate Commerce Commission or filed with the Commission and having the force of law, must not the state statutes fixing such rates fall because of "the paramount character of the authority of Congress to regulate commerce?"

The case of *Southern Railway Co.* v. *Reid*, 222 U. S., 424, while it relates to a state statute imposing penalties for refusal to receive freights and loaded cars, is decisive of the cases at bar as to the lack of power in the State to regulate the rates of interstate carriers for transporting intrastate commerce when such rates directly affect interstate commerce.

In that case, a statute of North Carolina made it an unlawful act accompanied by a penalty for a railroad to refuse to receive freight. The plaintiff Reid tendered freight to the Southern Railway Company with a demand that bill of lading be issued reading from Charlotte, North Carolina, to Davis, West Virginia. The railroad company had no through rate at the time between these points and because of the prohibition in the interstate commerce law against accepting freight where there was no tariff published, the railroad company refused to receive the freight, accept the charges or issue a bill of lading. The supreme court of North Carolina affirmed the judgment of the lower court imposing the penalty. This court reversed it.

The following extensive quotation is made from the opinion:

> "This statement indicates the questions which are presented for solution and the principles

upon which the solution of them depends. It hardly needs to be stated that transportation of property between the states is interstate commerce, and may be of federal rather than of state jurisdiction. We say may be of federal jurisdiction, for interstate commerce in its practical conduct has many incidents having varying degrees of connection with it and effect upon it over which the State may have some power. As to the extent of the power and the occasions for its exercise, controversies have arisen, and in deciding which the power of the State over the general subject of commerce has been divided into three classes: First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the State cannot act at all. *Covington, etc., Bridge Co.* v. *Kentucky*, 154 U. S., 209; *Western Union Telegraph Co.* v. *James*, 162 U. S., 650, 655.

These divisions, however, express but the extreme boundaries of the subject. Something more definite is necessary for the decision of the opposing contentions in the case at bar. The supreme court of the State was of the view that the statute simply regulated a duty which preceded the entry of the goods in interstate commerce, and concluded, therefore, that the statute was 'neither an interference with nor a burden upon interstate commerce.' And it decided that the execution of this duty was not precluded by the provision of the interstate commerce act requiring a schedule of tariffs to be established and charged. It was said by the court that it was the duty of the railway company to file such schedule, and that the company could not justify the violation of its common law duty by the neglect of its statutory duty.

The case, however, is not quite in such narrow compass. There is something more to be considered than the accumulation of defaults, if there be defaults. It is undoubtedly the duty of a railway company to receive freight when tendered for transportation. It may, besides, have other obligations, but it does not follow that it is within the power of the State to enforce them. There may be a Federal exertion of authority which takes from a State the power to regulate the duties of interstate carriers or to provide remedies for their violation. This is realized by defendants in error, and they assert that the state statute is in aid of commerce, and not an interference with or burden upon it, and therefore must be sustained as a valid exercise of the State's power, citing *A. C. L. Ry. Co.* v. *Muzursky*, 216 U. S., 122; *Western Union Tel. Co.* v. *James*, 162 U. S., 650.

It is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised. The question occurs: To what extent and how directly must it be exercised to have such effect?"

After referring to what was decided in *Missouri Pacific Railway Company* v. *Larrabee Mills*, 211 U. S., 612, the court further says:

"The principle of that case, therefore, requires us to find specific action either by Congress in the interstate commerce act or by the Commission covering the matters which the statute of North Carolina attempts to regulate. There is no contention that the Commission has acted, so we must look to the act. Does it, as contended by plaintiff in error, take control of the subject-matter and impose affirmative duties upon the carriers which the State can-

not even supplement? In other words, *has Congress taken possession of the field?*

It is not possible to epitomize the act by giving a more particular designation than that it was designed to regulate interstate commerce. Something more was certainly intended by it than the mere ordaining or the supervision of the movement of goods. In a certain general way traffic would be regulated by railroad and shipper, but their powers were not equal. The railroads had the greater power, and might and did exercise it in unreasonable charges and in discrimination. The potent instrument for this was the difference in the rate charged for transportation or by secret rebates if the charge was not discriminating in the first instance. Hence we said, in *Texas & Pacific Ry.* v. *Abilene Oil Co.*, 204 U. S., 426, 437: 'The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates.' To that end, it was further said, schedules of rates were required to be established and published, and departure from the rates established, except in the manner authorized by the act, was forbidden under criminal penalties, and any injury to persons was provided to be redressed through application to the commission or to the courts. And it is provided that 'if no joint rate over a through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applies to the through transportation.'

The commission is given the power to determine and prescribe the manner in which the schedules required by the act are to be kept. And it is enacted that, unless otherwise provided, no carrier 'shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are trans-

ported by said carrier have been filed and published in accordance with the provisions of this act.'

It is evident, therefore, that Congress has taken control of the subject of rate making and charging. All of the particular details we cannot set forth without extensive quotation from the act, which it is quite inconvenient to make. The provisions of the act are directed at the abuses most to be feared, unreasonableness in the rates and discriminations, including in the latter discriminations in service, in the acceptance and delivery of freight and in facilities furnished. The power which has been given to the commission to secure those results we have set forth in *Texas, etc., Ry. Co.* v. *Abilene Oil Co., supra,* and in *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.,* 215 U. S., 481.

* * * * *

There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of. We are, therefore, brought to consider what the statute of North Carolina provides. Leaving out qualifications with which we are not concerned, the act requires railroad companies to receive freight for transportation whenever tendered at a regular station and forward the same over the route selected by the person offering the shipment. Fifty dollars a day is the penalty prescribed for refusal, and all the damages incurred.

* * * * *

Conditions put on the receipt of articles at the railroad station may be conditions upon the traffic, and necessarily are within the regulating power of Congress. Their inducement and aim may be to secure a prompter performance

of duty by the carrier, and so far beneficent. But that is not the question. The question is, where is the control, in the State or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is demonstrated by the provisions of the interstate commerce act to which we have referred. * * * By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. * * *

We cannot assume that it was without consideration of its necessity that Congress enacted Section 2 of the Hepburn Act. It was no doubt the adaption of experience to the exigencies of a practical problem, Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to 'engage or participate in the transportation of passengers or property' until they had fixed and proclaimed the rate to be charged therefor —a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times. The power of Congress to so provide cannot be doubted. If the regulation be not exclusive, this situation is presented: If the carrier obey the state law, he incurs the penalties of the federal law; if he obey the federal law, he incurs the penalties of the state law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground. In so deciding we take no essential power from the States. The balances of the Constitution are only preserved and there is given to the States the power which is the

States' and to Congress the power which belongs to Congress."

The last expression of this court on the question of the power of Congress over commerce among the States, and in principle equally decisive of the cases at bar, is *Mondou* v. *New York, New Haven & Hartford Railway Co.*, 223 U. S., 1, decided January 15, 1912, being the cases arising under the Employers' Liability Act of April 22, 1908. The court says:

> "The clauses in the Constitution (Art. I, Sec. 8, clauses 3 and 18), which confer upon Congress the power 'to regulate commerce * * * among the several States' and 'to make all laws which shall be necessary and proper' for the purpose have been considered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these:
>
> 1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.
>
> 2. The phrase 'among the several States' marks the distinction for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State *and does not affect other States*, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally.
>
> 3. 'To regulate,' in the sense intended, is to foster, protect, control and restrain, with ap-

propriate regard for the welfare of those who are immediately concerned and of the public at large.

4. This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which the transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employes.

* * * * *

We are not unmindful that that end (and the safety of the employes) was being measureably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and *it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce.* The *Lottawanna*, 21 Wall., 558. 581-582; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S., 368, 378-379.

The second objection proceeds upon the theory that, even although Congress has power to regulate the liability of a carrier for injuries sustained by one employe through the negligence of another where all are engaged in interstate commerce, *that power does not embrace in-*

stances where the negligent employe is engaged in intrastate commerce. But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power.

It follows that the answer to the second of the questions before stated must be that Congress has not exceeded its power by prescribing the regulations embodied in the present act.

The third question, whether those regulations supersede the laws of the States in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice Marshall in *McCullough* v. *Maryland*, 4 Wheat., 316:

(p. 405) 'If any one proposition could command the universal assent of mankind, we might expect it would be this—that the Government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the Government of all; its powers are delegated by all; it represents all; and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The Nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, 'this Constitution, and the laws of the United States, which shall be made in pursuance thereof, * * * shall be the supreme law of the land,' and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take oath of fidelity to it. The Government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme

law of the land, 'anything in the constitution or laws of any State to the contrary notwithstanding.'

(p. 426) 'This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them.'

And particularly apposite is the repetition of that principle in *Smith* v. *Alabama*, 124 U. S., 465, 473:

'The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority.'

True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employes while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. *Sherlock* v. *Alling*, 93 U. S., 99; *Smith* v. *Alabama*, 124 U. S., 465, 473, 480, 482; *Nashville, etc., Railway* v. *Alabama*, 128 U. S., 96, 99; *Reid* v. *Colorado*, 187 U. S., 137, 146. The inaction of Congress, however, in no wise affected its power over the subject. The *Lottawanna*, 21 Wall., 558, 581; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, 215. And now that Congress has acted,

> the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. *Gulf, Colorado and Santa Fe Railway Co.* v. *Hefley*, 158 U. S., 98, 104; *Southern Railway Co.* v. *Reid*, No. 487 *ante; Northern Pacific Railway Co.* v. *Washington*, No. 136 *ante.*"

As the interstate employe, under this decision, is permitted to recover even where his injury was caused by the negligence of an employe engaged in intrastate commerce, on the theory that it is not the source of the injury but its effect on interstate commerce which is the criterion of congressional power, so likewise ought the railroads to prevail in these cases, even if the source of the rate was state legislative action as to intrastate commerce, provided the facts show direct and necessary interference with interstate commerce.

VII.

NOR DOES THE PROVISO CONTAINED IN THE FIRST SECTION OF THE INTERSTATE COMMERCE ACT MILITATE AGAINST THE VIEW THAT THE STATE IS POWERLESS TO PRESCRIBE INTRASTATE RATES IN CASES WHERE INTERSTATE RATES ARE DIRECTLY AND NECESSARILY AFFECTED.

The proviso reads as follows:

> "*Provided*, however, that the provisions of this Act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid. * * *"

The proviso gives no power to the States which they did not possess before. Nor does it take away any power from Congress which it possessed under the commerce clause of the Constitution. It was beyond the authority of Congress to clothe the States with any power which it possessed under the commerce clause.

In *Cooley* v. *Wardens*, 12 Howard, the court says on page 318:

> "If the Constitution excluded the States from making any law regulating commerce certainly Congress cannot regrant or in any manner reconvey to the States that power."

In *Gunn* v. *Barry*, 15 Wall., the court says on page 623:

> "Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States, and is alike obligatory on both."

The States have exactly the same power and no greater over intrastate commerce with the proviso inserted that they would have had with the proviso omitted and the Interstate Commerce Commission has precisely the same power over interstate commerce with the proviso inserted that they would have had without the proviso.

The authority of both over commerce is not changed or affected.

In *Railway* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, this court, while stating that it was adverse to repeals by implication, yet abrogated the common

law remedy of a shipper in the state court because to retain the common law remedy would be to deprive the interstate commerce act of its efficacy and render its provisions nugatory; and it did this in the face of that provision of the interstate commerce act which says:

> "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

On page 436 the court said:

> "As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory. * * * Let us, without going into detail, give an outline of the general scope of that act with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress and the remedies which the act established to accomplish the purposes which the lawmakers had in view.
>
> The act made it the duty of carriers subject

to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade.

* * * * *

That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S., 479, 494. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 184; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S., 479."

On page 446 the court said:

"But it is insisted that, however cogent may

> be the views previously stated, they should not control, because of the following provision contained in section 22 of the act to regulate commerce, viz., '* * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' *This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.*"

The doctrine of the Abilene case withdrawing from the courts the right to enforce common law remedies inconsistent with the act, notwithstanding the terms of section 22, if applied to the cases at bar, will withdraw from the Missouri legislature the power to prescribe intrastate rates if the same affect interstate commerce, notwithstanding the terms of the proviso.

The proviso was doubtless inserted in the act out of abundance of caution. As Judge Sanborn says in the Shepard case:

> "The natural and reasonable construction of the proviso in Section 1 is that it was inserted out of abundance of caution to make sure that the broad terms of the Act did not go beyond the constitutional power of the Congress and directly regulate intrastate commerce more than was necessary to regulate interstate commerce."

Hence, the proviso leaves the States just as they have been ever since the case of *Gibbons* v. *Ogden*, in control of the transportation of passengers or property wholly within their borders which is "completely," "exclusively" and "purely" internal commerce and which does not "affect other States."

The control by Congress over intrastate commerce which is not "completely," "exclusively" and "purely" internal and which does "affect other States" is "incidental" to its power under the commerce clause of the Constitution.

Admitting power in the State over intrastate commerce, completely, exclusively and purely internal, whenever its exercise affects the commerce of other States, it comes in conflict with the Constitution of the United States and laws passed in pursuance thereof, and the power of the State at once gives way to the paramount power of the Nation.

VIII.

ANSWER TO POINTS IN BRIEF FOR STATE.

The burden of the argument of counsel for the State, oft repeated, upon the question of the direct effect of the Missouri statutes upon interstate commerce is that "it is a legal impossibility for state rates to change interstate rates."

This quotation is from page 5 of the State's brief in the Burlington cases, Nos. 130 and 134.

On page 22 it is said:

> "It is evident, upon a moment's reflection, that the reduction of state rates on interstate traffic cannot, as a matter of law, change interstate rates. It is an impossibility."

Again, on page 29, it is stated:

> "The mere fixing, raising or lowering of maximum passenger or freight rates on intrastate commerce can in no way change or affect interstate rates, as in law it is an impossibility."

Again, counsel say on page 49:

> "As the state rates, both passenger and freight, cannot as a matter of law, interfere with interstate rates, that ends the contention of the appellee that the Missouri laws in question impinge upon the commerce clause of the United States Constitution."

Counsel finally say in the concluding paragraph of their brief upon this question, pp. 57, 58:

> "The Missouri statutes involved disclose upon the face of each act and specifically provide that such acts apply to passenger traffic and freight traffic wholly within the State of Missouri. There is nothing upon the face of the statutes to show any other purpose or intention, and the effect of a strict compliance with these freight and passenger laws will not and cannot legally affect interstate rates nor constitute them a direct and substantial burden upon interstate commerce. The contention of appellee is so puerile and so wanting in merit it is but a waste of time to pursue the subject further."

This court has already said when the question was raised *in limine* and before the evidence was taken in the Minnesota cases, that it was not frivolous.

Judge McPherson in the Missouri cases said in regard to the point:

> "This is a great question, and one which is far reaching, and in importance cannot be overstated."

Judge Sanborn, in the Minnesota cases, held the question not only not "puerile," but decisive and controlling, and his reasoning if applied to the Missouri cases is equally sound and incontrovertible.

The argument of the State, when analyzed, is that because the Missouri legislature confined its action,

upon the face of the statutes, to intrastate transportation of freight and passengers, such action, as a matter of law, could not affect interstate commerce.

The question, however, is one of fact, and the purpose for which the statutes were passed is beside the case, if their necessary effect is to interfere with or burden interstate commerce.

As a complete answer to the position of the State in this regard we repeat what this court said in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S., 1:

> "But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things."

On page 48, counsel for the state quote with approval from the unreported opinion of Judge Bean in the case of *Southern Pacific Company* v. *Campbell*, as follows:

> "A large part of the discussion herein is directed to the constitutionality of the railroad commission act, and the contention that the order sought to be enjoined directly and materially affects interstate commerce. Both of these questions were considered and decided by this court in the Campbell case (*O. R. & N.* v.

Campbell, 173 Fed., 957). The opinion of Judge Wolverton in that case contains such an exhaustive, satisfactory and full discussion of the subject as to leave nothing to be added."

But, upon referring to Judge Wolverton's opinion, we find the following:

> "The next objection urged to the act is that it is an encroachment upon the constitutional authority of Congress, in that, in practical operation, it interferes with interstate commerce. It is one thing to determine whether the act itself attempts to regulate interstate commerce, *and another to determine whether in its practical operation it is effective to that end.* I assume that, if an affirmative answer is given to either of these questions, the law cannot stand."

Counsel for the State, in planting their whole case in regard to the question of the interference of the state-made rates with interstate commerce upon the proposition that "it is a legal impossibility for state rates on intrastate traffic to change interstate rates," entirely overlook and ignore the equally important inquiry, recognized by Judge Wolverton in the Campbell case, in exact harmony with the decisions of this court, "whether in their practical operation they are effective to that end."

This inquiry is conclusively answered in the affirmative by the record in the cases at bar.

Such being the case, in the language of Judge Wolverton, "the law cannot stand."

The main subject covered by the interstate commerce act is rates. Rates must be reasonable. They must not be unjustly discriminatory. They must not be unduly preferential. They must not be more for

a short haul than for a long haul in the same direction, unless there are circumstances and conditions, such as competition, for example, justifying the lesser charge for the long haul. Schedules of rates must be filed by the carrier with the Interstate Commerce Commission, which have the force of law, until changed by the filing of new tariffs or by order of the Commission, binding alike upon both the shipper and the carrier. Rates so filed, having the force of law, are presumed to be reasonable, until otherwise so found by the Commission after investigation. The revenues of the carrier are dependent upon its rates and the adequacy of return is dependent upon the establishment and maintenance of a reasonable schedule. The presumption is that a schedule in effect at any given time, evidenced by tariffs on file with the Interstate Commerce Commission, is reasonable. The Missouri statutes in question relate to lowering of *rates*, covering carload shipments of certain commodities and also embracing passengers. If, as a matter of fact, such state statutory rates necessarily obstruct the free flow of interstate commerce while the interstate tariffs remain unchanged or force a change of the interstate rates in order that the carrier may protect its business and prevent discrimination, then the statutes prescribing such rates are void, both as a burden upon and an interference with interstate commerce.

The constantly recurring question is:

> "Do the state statutes, as the necessary result of their operation, compel interstate carriers to readjust their rates, theretofore lawful

> under tariffs filed with the Interstate Commerce Commission, under the interstate commerce act, in order to hold their competitive business, even at a reduced revenue, or to avoid the charge of discrimination, either at common law or under the act, as between localities, where the circumstances and conditions of transportation are substantially similar?"

If they do, such statutes are void because they directly interfere with interstate commerce.

Counsel next claim that

> "the provisions of the interstate commerce act forbidding discriminations between localities, etc., apply only to discriminations in interstate commerce, and do not and could not condemn as 'discrimination' differences between interstate and intrastate rates from given distributive centers to border stations inside and outside the state boundary."

In other words, the claim is that a railroad, either of its own motion or in obedience to a state law, may fix any rate it pleases or is required to fix on intrastate traffic and that such action will furnish no ground for a charge of discrimination on the part of localities bordering on the particular State whose transportation circumstances and conditions are similar, but against which higher interstate rates are maintained. If there were no interstate commerce act, such action on the part of the carriers, if voluntarily undertaken, would constitute discrimination at common law, and it would be no defense to an action at common law against the carrier that the rate was required in obedience to a state statute, because the discrimination would exist in both cases, and to defeat the charge, the railroad

would have to reduce its rates, no matter how reasonable in and of themselves.

In *West, Attorney General,* v. *Kansas Natural Gas Company,* 221 U. S., 229, the court, without reference to the interstate commerce act, asserts the following proposition:

> "No State by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on."

But there is an interstate commerce act, in full force and effect, covering the whole field of commerce among the States, operative within as well as without every State, and binding upon every State and every citizen.

Its mandate against discriminations is comprehensive and all embracing. It does not stop at state lines. It makes no exceptions. Following the doctrine of the Mondou case, it is not the source of the discrimination, but only the effect flowing from such source, which is the "criterion of congressional power." And this is true whether it be the voluntary action of the railroads or the enforced action taken in obedience to state statutes. Powerless, indeed, would the nation be, under the commerce clause, if the States could enforce laws for the supposed advancement of the material prosperity of its people, no matter how unjustly and iniquitously such laws operated in discriminating against the commerce of other States.

If such were sound doctrine, "the government and its laws might be prostrated at the feet of local au-

thority." But it is radically unsound. The interstate commerce act protects commerce among the States from discriminatory acts of carriers voluntarily done, and discriminatory acts forced upon such carriers by state legislation. There is absolutely no difference in principle between the two cases. Under the commerce clause of the Constitution and under the interstate commerce act, both are subject to judicial condemnation.

In *Reliance Textile & Dye Works* v. *Southern Railway Co.*, 13 I. C. C. R., 48, the Interstate Commerce Commission held that it had jurisdiction of a complaint as to discrimination by interstate shippers where the discrimination consisted of a low intrastate rate voluntarily put in by the carrier. The Commission says:

> "When a discrimination, forbidden by the act to regulate commerce, arises from an adjustment of state and interstate rates, carriers subject to our jurisdiction and participating in the interstate rates can not escape responsibility by claiming that the discrimination is accomplished through a reduction of the state rate so long as that reduction is voluntary. They were answerable for the effect produced by the combination of rates, all of which they control.
>
> The Southern Railway, for example, names the rate from the producing mill in South Carolina to the works of the complainant at Cincinnati, and it also names the rate from the same mill to the Clearwater works in South Carolina. Its duty is to treat, in the matter of transportation, both these operations with fairness. It can no more shut up the industry of the complainant by unduly reducing the state rate made to its competitor than by unduly advancing the interstate rate which the complainant itself is required to pay.

This must certainly be so where the state rate is voluntarily made, and we think that the same conclusion must finally be reached where the state rate is made by a state authority. A State can no more improperly prefer an industry within its borders as against an industry located without by the imposition of an improper freight rate than the Southern Railway can unduly prefer that industry in its own interest."

Judge Sanborn says in the Shepard case:

"The evil the act was passed to remedy, the main purposes of its passage, the public demand for a prevention of all discriminations, the patent effort of the legislators to meet this demand, and the broad terms of the prohibitions themselves compel the conclusion that the Congress intended to exercise, and that by this act it did exercise, its constitutional power to prevent discriminations of the character here in question to its utmost extent, and that the companies were and are prohibited thereby from making or maintaining the unjust discriminations between localities which the maintenance of their former lawful interstate fares and rates and the intrastate rates prescribed by the acts and orders of the officers of the state would necessarily effect. *Reliance Textile & Dye Works* v. *Southern Ry. Co.*, 13 Interst. Com. R., 48, 54."

Counsel for the State concede that "in exercising the State's commerce power over the intrastate *rates*, it is not exempted, however, from the limitations of the *fourteenth amendment to the federal Constitution as to confiscation*, etc." They say, however, that "the *amount* named as to such *rates* has nothing to do with, and has never been regarded as an infringement upon the *commerce clause* of the Federal Constitution." Again, counsel say that

"Laws simply naming *maximum rates*, on a federal question, are measured solely by the *fourteenth amendment*, and the other class of laws by the *commerce clause.*"

But both provisions are in the same instrument. If the rate charged is shown by the facts to be confiscatory it is void under the fourteenth amendment. Likewise, if the rate charged is shown by the facts to necessarily and inevitably affect the interstate rates, or what is the same thing, affect the rates at which interstate commerce thereafter moves, it is void under section 8 of Article I.

Again, counsel contend that state legislation can not be held to directly affect interstate commerce because the railroads *"voluntarily rearranged"* their interstate rates to conform to the state rates fixed by law. They say:

> "The important fact is overlooked that the change made in interstate rates was not made by reason of *legal compulsion but by voluntary action.*"

But, as we have already shown, the force of competition is as potent a law of trade as the force of gravitation is in the physical world. It is recognized in the interstate commerce act, in numerous decisions of this court, and in the Eubank case was made a distinct ground of defense against the validity of the long and short haul clause of the Kentucky constitution, justifying the railroad in its refusal to make its rates for the longer interstate haul conform to those of the shorter state haul. The language of the Eubank opinion in this regard is so complete

an answer to the State's contention as to justify repetition:

> "It seems also to be thought that there is no regulation of commerce, provided it is not interfered with or regulated in all ways by which transportation of commodities between interstate localities may be accomplished; that if the commodity (tobacco in this case) can be transported by any other means or route, or by any other individual or corporation than the one affected by the regulation, commerce is not regulated within the constitutional meaning. On the contrary, it seems quite clear that any law which in its *direct result regulates the interstate transportation of a single individual carrier, or company of carriers, violates the provision in question; that it is no answer to say the commodity can still be transported by another carrier or by water instead of rail, so long as the direct effect of the state legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or by a particular individual or company.*"

Upon the issue of necessary interference with interstate commerce, the question of the reasonableness of the State rates *per se* is not involved, as the State's counsel seems to assume.

The question as to whether the state rates are compensatory or confiscatory arises under the fourteenth amendment, regardless of their interference with interstate commerce.

The question as to whether such rates directly affect interstate commerce arises under the commerce clause, regardless of their compensatory or confiscatory character.

But if the question of reasonableness is to be con-

sidered, in connection with their effect upon interstate commerce, they must be conclusively presumed and held unreasonably low measured by the standard of tariff rates of the railroads, shown by their schedules either prescribed by or filed with the commission and, under the interstate commerce act, having the force of law.

As to the effect of the statutory rates, the record teems with evidence as to their confiscatory character, both freight and passenger, and an actual test of the passenger rate before the injunction was granted reduced interstate passenger fares from Chicago to Kansas City from $12.50 to $9.20, on account of the requirements of the two-cent passenger laws of Illinois and Missouri. And that reduction applied on all travel to the Pacific coast, whether it crossed the borders of Missouri or not.

In the original brief for the State in the Burlington case, counsel quote finding 10 of the court below, as follows:

> "After the adoption of the two-cent fare statute, there was no substantial increase in travel. For a few weeks there was a small increase largely brought about by interstate passengers buying tickets to state lines, etc." (Rec., 5310.)

They then say:

> "We concede the correctness of this finding so far as it relates to *increase in state travel due to interstate passengers buying tickets to state lines.*
>
> * * * * *
>
> Besides, the testimony is direct that this continued for but a short time and only until the companies readjusted their interstate rates to

> the reduced state rates, which it is contended all of them did very soon." (Brief, 339.)

Counsel for the State, in their present brief, in commenting upon the case of *Shepard* v. *Northern Pacific Railway Company*, 184 Fed. Rep., 765, say:

> "The Sanborn opinion is without precedent, is a radical departure, a legal impossibility, and is founded upon neither law, logic nor reason. The opinion itself is its own undoing."

But in *Ex parte Young* (209 U. S., 123, 145), when the case, in its early stages, was here, this court said of the question afterwards decided by Judge Sanborn in the light of a voluminous record, that it was "not at any rate frivolous." The recent decisions of this court in analogous cases show that the Sanborn opinion is in harmony with the principles enunciated in those cases, and cannot be justly denounced as without precedent or a radical departure or a legal impossibility.

We respectfully submit that its law is sound and its logic and reasoning unanswerable.

So far from the opinion being "its own undoing," its masterful exposition of the law under the commerce clause of the Constitution and of the acts of Congress passed in pursuance thereof, and of the decisions of the courts thereunder, when applied to the facts of the Missouri cases, ought to result, we respectfully submit, in the undoing of the legislation of the State.

Is there anything legally impossible or which constitutes a "radical departure" in the following propositions asserted by Judge Sanborn?

> "To the extent necessary completely and ef-

fectually to protect the freedom of and to regulate interstate commerce the nation by its Congress and its courts may affect and regulate intrastate commerce but no farther."

"To the extent that it does not substantially burden or regulate interstate commerce a State may regulate the intrastate commerce within its borders, but no farther."

"If the plenary power of the nation to protect the freedom of and to regulate interstate commerce and the attempted exercise by a State of its power to regulate intrastate commerce, or the attempted exercise of any of its other powers, impinge or conflict, the former must prevail and the latter must give way because the Constitution and the Acts of Congress passed in pursuance there are the supreme law of the land, and that which is not supreme must yield to that which is supreme."

How similar this is to the doctrine announced by Mr. Justice Van Devanter, then Circuit Judge, in one stage of the Arkansas rate litigation, as set forth in the brief of Charles W. Bunn, at page 100:

"Congress has entire authority over interstate commerce, and the States have a like authority over intrastate. It is said, in a great many cases, where there is a slight impinging of one upon the other, that, as the law of Congress made in pursuance of the federal constitution is supreme, that such impinging as is *incident* to the exercise by Congress of its full authority, it is necessarily contemplated by the constitution therefore, that the authority vested in the State is subordinate to that. If you were to go a little bit farther and apply that here, taking as your premise that the authority of Congress is supreme and therefore in respect of interstate commerce its authority shall be everywhere equally dominant, I am not sure but what the result would be in some instances

where there is such a confusion, such an interweaving, as that there could not be a separation, there the power of Congress would be the dominant power and that the other power would not exist; *not on the theory that Congress has any authority over intrastate rates, but that since its authority over interstate commerce must reach in every part and parcel of it, Congress may say that anything that gets interwoven with it must partake of the exercise of that authority.* Otherwise the power of Congress which is supreme would not be supreme."

Judge Trieber, in the Arkansas Rate Cases, *supra*, cited by the State, in referring to Judge Sanborn's opinion in the Shepard case, says:

"It was also shown that a number of cities in that State were situated side by side with cities of the adjoining States of Wisconsin and North Dakota. These cities being the same distance, they had always been accorded like rates, in and out, by the railroads, and a failure by the companies to maintain like rates for these cities would seriously impair the power to transact their interstate business with these cities in the neighboring States; and the natural effect of these lower Minnesota state rates would give to the cities of that State on its border line an undue and unjust preference—an advantage, in fact, over the neighboring cities in adjoining States. The same conditions applied to the passenger traffic."

He adds:

"No such facts were proven in these cases, and for this reason the court is of the opinion that the conclusions reached in the Shepard case are not applicable to these cases."

But the facts in the Missouri cases, particularly as to the location of pairs of cities in adjoining States and the direct and necessary effect of state

made rates on interstate rates, are identical with those in the Minnesota case.

IX.

CONCLUSION.

We respectfully submit that the following propositions have been established:

1. The effect of the state statutes upon interstate commerce is direct, immediate and inevitable, necessarily resulting from the juxtaposition of commercial centers at state lines and from the transportation by state and interstate carriers of traffic between Missouri cities.

2. The power of the federal government under the commerce clause of the Constitution is as broad and comprehensive as the necessities of commerce from time to time demand.

3. In the early history of railroad transportation, lines were local and separate and independent, and commerce was completely intrastate. There were no such things as interstate carriers, with through trains, through rates, through billing, through cars, either passenger or freight.

4. Now systems are transcontinental, united and interdependent, not knowing or recognizing state lines in organization or management or operation except where state laws and regulations require. Their rates are made, their trains are moved, without reference to state lines.

5. A schedule of rates, filed with the Interstate

Commerce Commission, which are fair and reasonable and in advance of successful attack are the only lawful rates to be charged, is instantaneously nullified by a schedule of state rates which has an immediate effect on the interstate rates, either by forcing a reduction to the neighboring state rates by the irresistible law of competition to enable the interstate carriers to hold their business even at the reduced revenue, or by creating a discrimination against the interstate points which it was one of the main objects of the interstate commerce law to prevent.

6. A railway system running through several states, carrying traffic, state and interstate, on its local and through trains, indiscriminately, is a unit and should be so treated, particularly in regard to rate regulation. Its value is dependent, not alone upon its property in any one or more States, considered separately, but upon its oneness and indivisibility, its terminals at trade-centers, its wharves and ship connections, at tide-water, its volume of business as a whole, its worth as a going concern.

It is entitled to earn a reasonable return measured by the value of its services, and no court has ever denied that such return must at least equal a fair interest upon the value of the property devoted to the public service. Recognizing the unity of railway systems traversing two or more States, and for the purpose of regulating their rates, so that they should be reasonable alike to the shippers and the carriers, and of preventing unjust discriminations and undue preferences as between persons, corpora-

tions and localities, in the different States, the interstate commerce act was passed, and, as conditions demanded, was amended and strengthened. The Interstate Commerce Commission was created to administer the act, and to see that reasonable rates were charged and discriminations and preferences prevented. Provision was made for the filing of tariffs of rates by the railroads which had the force of law, until set aside by the Commission, or voluntarily changed by the carriers. It thus became possible for a system of rates to be gradually built up under the direction of the Commission, which would be fair to the shippers as well as to the carriers, and would insure a just return upon the value of the railroad as a whole, considered as a going concern.

To that end, the Commission has been empowered, by amendments to the act, not only to condemn unreasonable rates but to prescribe such as would be reasonable, and to control proposed increases of rates by the railroads in the first instance, approving such as investigation showed were reasonable, and denying the others. To enable them to definitely ascertain the various sources of revenue and the different classes of expenses of the railroads, and thereupon fix rates, the Commission has been authorized to prescribe a system of accounts, covering the receipts from all kinds of business, intrastate and interstate, and the expenses incurred in conducting the same. This system of accounts is necessarily exclusive, is so recognized, and has been so adjudicated by state tribunals. Considering the unity of the property, both as to value and as to operation, the interdependence of rates, the single

system of accounting, and the necessity for unity of control, it is at once apparent that the power to prescribe rates for transportation over such systems by state legislatures and state commissions ought to be denied, because such rates inevitably interfere with interstate commerce, and cast an unjust burden thereon, destroying the unity of the system and necessarily impairing the supremacy of the control of the Interstate Commerce Commission thereover.

The conclusion of the whole matter is that, just as in the days of *Gibbons* v. *Ogden*, the national government was accorded plenary and paramount control over commerce on the navigable waters of the United States as national highways of commerce even between points in the same State, so in this latter day of railway rate legislation and of many recent great cases, to which we have referred, the supremacy of federal control over commerce on the railroad systems of the country as artificial highways of commerce has been most justly and emphatically asserted.

This is absolutely necessary in order to preserve and maintain that unity of control and regulation first authoritatively established in *Cooley* v. *Board of Wardens*, so that commerce will flow freely both in and through all the States, without burden or interference by state authority.

In the present state of the law and of commerce, both from the standpoint of the shipper and of the carrier, it will not do to say that the meeting of state-made rates by an interstate carrier is a voluntary act because it is done to enable such carrier to

compete with the state carrier for the business or that the existence of such competition is an "intervening cause."

The facts being established as they are in this record, the law or force of competition is just as compelling and inexorable as the law or force of gravitation, and it might as well be said that the force of gravitation was an intervening cause between the shaking of the apple from the tree and its reaching the ground, as to say that the force of competition was an intervening cause between the reduction of rates by state authority and their corresponding reduction by the interstate carriers to hold their business and avoid the charge of discrimination.

This view is not only in accord with "the rule of reason," but, as we have seen, it has been expressly recognized by Congress in the interstate commerce act, and several times authoritatively decided by this court.

To sustain our position does not mean an end of the control of railroads by the States. The statute books of the several States are full of laws, evidencing their extensive control and regulation of almost every activity of the roads. The various instances where that control has been judicially recognized are set forth in great detail by Judge Sanborn in the *Shepard* case, 184 Fed. Rep., at page 771, as follows:

> "Subject to the constitutional limitation, which has been stated [forbidding direct interference with interstate commerce], a state may enact and enforce laws prescribing reasonable fares and rates for and otherwise regu-

lating its intrastate commerce, although the operation of such laws remotely or incidentally affects interstate commerce, such as statutes regulating elevator charges (*Munn* v. *Illinois*, 94 U. S., 113, 135; *Budd* v. *New York*, 143 U. S., 517, 545); requiring track connections at a junction (*Wisconsin, etc., R. R. Co.* v. *Jacobson*, 179 U. S., 287); prohibiting the operation of freight trains on Sunday, regulating the liability of the initial carrier beyond its line (*Richmond, etc., R. R. Co.* v. *Patterson Tobacco Co.*, 169 U. S., 311); requiring the reasonable stopping of passenger trains at stations (*Lake Shore & Michigan South. Ry. Co.* v. *Ohio*, 173 U. S., 285; *Gladson* v. *Minnesota*, 166 U. S., 427, 431); requiring telegraph companies to receive messages within a state and transmit them with reasonable diligence (*Western Union Telegraph Co.* v. *James*, 162 U. S., 650, 656); excluding diseased cattle by means of a reasonable inspection law (*Asbell* v. *State of Kansas*, 209 U. S., 251, 256); requiring reasonable connections between trains of different companies (*Atlantic Coast Line R. R. Co.* v. *North Carolina Commission*, 206 U. S., 1); regulating reasonably the operation of passenger trains (*Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S., 262); requiring the transfer of cars to a mill near a crossing (*Missouri Pacific Ry. Co.* v. *Larabee Mills Co.*, 211 U. S., 612, 620, 622); prohibiting the possession of game (*New York ex rel. Silz* v. *Hesterberg*,, 211 U. S., 31, 40, 41); requiring locomotive engineers to be examined and licensed (*Smith* v. *Alabama*, 124 U. S., 465; *Nashville, etc., Ry. Co.* v. *Alabama*, 128 U. S., 96); requiring railway companies to fix their rates annually for the transportation of passengers and freights and to post a printed copy of such rates at their stations (*Railroad Company* v. *Fuller*, 17 Wall., 560); forbidding the consolidation of parallel or competing lines of rail-

way (*Louisville & Nashville R. R. Co.* v. *Kentucky*, 161 U. S., 677); regulating the heating of passenger cars and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (*New York, N. H. & H. R. R. Co.* v. *New York*, 165 U. S., 628); providing that no contract made within the State shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers which would have existed if no contract had been made (*Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan*, 169 U. S., 133); prescribing rates within the state on a single article, coal (*Minneapolis & St. L. R. R. Co.* v. *Minnesota*, 186 U. S., 257, 265; *Northern Pacific Ry. Co.* v. *North Dakota*, 216 U. S., 579)."

Relative to the last two cases cited, it is to be noted that no point was made in the first case except as to the confiscatory character of the rate, and while the point of interference with interstate commerce was made in the second case, there was no showing, so far as the record discloses, that the rate prescribed did as a matter of fact interfere with such commerce.

It is only rates which directly and necessarily affect interstate commerce that the federal Constitution and the laws of the land say ought to be and are under national control.

As so well stated by this court no longer ago than January 9, 1912, in the *Reid* case, already cited:

> "It is evident, therefore, that Congress has taken control of the subject of rate making and charging.
>
> * * * * *
>
> There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce act is aimed. It is true

that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of.

* * * * *

Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground. In so deciding we take no essential power from the States. The balances of the Constitution are only preserved and there is given to the States the power which is the States' and to Congress the power that belongs to Congress."

Nor does the proviso abate one jot or one tittle from the supremacy of federal control. No power was or could be given thereby in conflict with the Constitution, and none was taken away from the States which did not exist before. For whatever state commerce there may be whose regulation does not directly affect interstate commerce, the States can still prescribe the rates for carriage.

Such limitation upon state control of railroad rates is exactly analogous to that which was recognized as to navigable rivers by the Court of Errors of New York in the *Livingston* case, *supra*, after the decision in *Gibbons* v. *Ogden*, when the court said:

> "The internal commerce over which the State has exclusive control is something existing where coasting vessels cannot come, or have no right to navigate, as in the case of a ferry within the State."

The paramount power of Congress over the regulation of rates even for intrastate commerce when such rates directly affect interstate commerce is incidental to the express grant of power to regulate commerce among the States.

As Chief Justice Marshall says in *Gibbons* v. *Ogden:*

> "If Congress license vessels to sail from one port to another, in the same State, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police."

With the cases now before this court from Minnesota, Kentucky, Arkansas and Oregon, as well as from Missouri, on the question, among others, of the interference of state-made rates with interstate commerce; with the evidence of Chairman Knapp, now Presiding Judge of the Commerce Court, in the Nebraska case, printed as an Appendix to Mr. Bunn's brief; with the order of the Iowa Commission printed therein; and with the orders of the Texas Commission and the Arkansas Commission on the same question, set out in this brief, if the position of the States is sustained, are we not rapidly approaching the same unfortunate condition as to transportation by rail which would have wrecked our commerce by water in the early history of the country had not the commerce clause of the Constitution been adopted and its supremacy judicially determined in *Gibbons* v. *Ogden*?

But that clause of the Constitution, as this court, particularly of late, has so emphatically decided, applies with the same force and comprehensiveness to transportation by rail that it does to transportation by water.

How similar the situation today, in the light of

the claims of the several States, to that existing just prior to the adoption of the federal Constitution, is clearly shown by Mr. Webster when he says in his great argument in *Gibbons* v. *Ogden:*

> "Few things are better known than the immediate causes which led to the adoption of the present Constitution, and there is nothing, as I think, clearer than that the prevailing motive was to *regulate commerce,* to rescue it from the embarrassing and destructive consequences resulting from the legislation of so many different States, and to place it under the protection of a uniform law. * * * By the confederation, * * * the States could still, each for itself, regulate commerce, and the consequence was a perpetual jarring and hostility of commercial regulation."

And does he not, in the same argument, state our position in these cases with convincing force?

> "Congress has no power of revoking state laws, as a distinct power. It legislates over *subjects;* and over those subjects which are within its power its legislation is supreme and necessarily overrules all inconsistent or repugnant state legislation."

GARDINER LATHROP

APPENDIX TO BRIEF.

This very recent decision of the Supreme Court of Oklahoma is a distinct recognition of the supremacy of federal control over interstate carriers to the exclusion of the States:

"IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Gulf, Colorado and Santa Fe Railway Company,
Plaintiff in Error,
vs.
State of Oklahoma,
Defendant in Error.
} No. 3269.

(Filed March 12, 1912.)

1. Order No. 148 of the Corporation Commission, in so far as it relates to common carriers engaged in interstate commerce, covers the same subject-matter embraced within certain sections of the act of congress of March 3, 1901, entitled "An Act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the interstate commerce commission." Held, that the order of the commission must yield, and is superseded by the federal act.

2. The right of a state to apply its police power for the purpose of regulating interstate common carriers engaged in interstate commerce exists only from the silence of congress on the subject, and ceases when congress acts on the subject or manifests its purpose to call into play its exclusive power. (Syllabus by the Court.)

APPEAL FROM THE CORPORATION COMMISSION.

Reversed.

Opinion of the court by KANE, J.:

This is an appeal from an order of the corporation commission imposing a fine of $500 on the plaintiff in error for failing "to make report to corporation commission in time specified on derailment of passenger train," in violation of order No. 148 of the commission, which requires all railway companies operating within the state, upon the happening of an accident, at once telegraph to the commission the following information, in the following class of accidents: All accidents resulting in loss of life or limb or serious injury to passengers or employes. The telegraph report shall show the date, time, and place of accident; the train or trains involved; the number of passengers killed or injured, if any. The accident which was not reported within the time prescribed in the order, was the derailment of a passenger train at a bridge on the Washita river on plaintiff in error's line of railway, which occurred on the 14th day of December; the passenger train left the track and plunged into the river, killing one and injuring about 40 passengers. It appears that the plaintiff in error is an interstate railway and that the train was an interstate train, engaged in interstate as well as intrastate traffic.

Appeals from order No. 148 were taken to this court by several railway companies, which were dismissed upon the ground that the court is without jurisdiction to review such order. *St. L. & S. F. R. R. Co.* v. *State et al.*, 24 Okla., 805; *A. T. & S. F.*

Ry. Co. v. *State*, 24 Okla., 807. It is now contended by the attorney general that,

> "This court having twice declined to review the commission's general order No. 148, on appeals attempted for that express purpose, holding that it had no jurisdiction to do so (105 Pac., 351 and 352), we assume that the same will not be inquired into in the present proceeding, except for the purpose of determining the commission's power to make the same, it being jurisdictional as to order No. 466, herein appealed from, predicated thereon."

As the corporation commission is only empowered by the constitution to enforce compliance with its lawful orders by adjudging fines or penalties against the delinquent or offending parties or companies (Const., sec. 19, art. 9), this court must have jurisdiction to determine the commission's power to make the order violated when cases of this class come before it for adjudication on appeal. *A. T. & S. F. Ry. Co.* v. *State*, 26 Okla., 166.

The plaintiff in error contests the power of the corporation commission to promulgate order No. 148 upon many grounds, two of which at least ought to be sustained; they are: Order 148 is violative of the commerce clause of the federal constitution and of the act of March 3, 1901, entitled, an "Act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the interstate commerce commission." It seems to us that this position is well taken, and abundantly supported by authority. In *St. L. & S. F. R. R. Co.* v. *State et al.*, 26 Okla., 62, it was held that the order of the corporation commission in so far as it applies to interstate commerce, is void, for the reason

that it is in conflict with and is superseded by sections 1 and 2 of an act entitled "An Act to amend an act entitled 'An Act to regulate commerce' * * * and for the further reason that it interferes with and imposes upon interstate commerce an unreasonable burden." The order involved in that case provided that ten days' free storage shall be allowed on less than car load shipments, when destined to consignees who live at interior points five miles or more from the railway station. That case correctly defines the power of the state over interstate commerce, and when and under what circumstances such power may be exercised, substantially as follows: The state may, in the absence of congressional inhibition, enact laws and regulations on matters local in their nature which tend to enforce the proper performance by interstate carriers of duties arising in the state, and which do not impede, but aid and facilitate interstate traffic, although such laws or regulations may incidentally affect interstate commerce; but when any such laws passed by the state in the exercise of its police power come in conflict with an act of congress upon the same subject-matter, or the power granted to congress over any such matter has been exercised by that body by the enactment of legislation upon the precise subject-matter covered by the act of the state legislature, the law of the state must yield, and is superseded by the federal act. The supreme court of the United States in several recent and important cases has developed that doctrine until its application to particular cases is now a matter of little difficulty. That the order of the corporation commission and the federal act cover

precisely the same subject-matter, there can be no doubt. We have, therefore, an order of the corporation commission and an act of congress pertaining to interstate carriers. When that occurs the authorities hold that the order of the commission must yield to the act of congress. In the case of *Southern Ry. Co.* v. *Reid & Wife*, decided by the supreme court of the United States, and not yet officially reported, the validity of a statute of the state of North Carolina, which required the agents and officers of railroad and other transportation companies to receive freight for transportation whenever tendered and to forward the same by the route selected by the person tendering the same under a penalty of $50 a day and actual damages in addition thereto, was involved. The supreme court of the state held the state law valid. It was especially insisted that inasmuch as it merely penalized a failure to receive shipments of freight and that freight tendered for shipment could not become interstate commerce until it was received for transportation as such, it was not an attempt to regulate interstate commerce. The federal supreme court held that congress having legislated with reference to the precise subject matter, such legislation is conclusive, and state legislation thereon must yield. A very similar question was involved in the case of *Northern Pacific Ry. Co.* v. *State of Washington ex rel. John D. Atkinson, Atty. Genl.*, decided by the United States Supreme Court January 9, last. In that case a statute of the state of Washington regulating the hours of service of railway employes was involved. The state law was held to be in conflict with the federal hours of serv-

ice law, which was approved March 4th, 1907, but which did not become effective until March 4, 1908. The attorney general commenced an action in the name of the state of Washington to recover penalties under the Washington Act for violation of same occurring on June 11, 1907, some two months after the federal law was enacted, but more than ten months before it became effective. Mr. Chief Justice White answered this contention as follows:

> 'But we are of opinion that this view is not compatible with the paramount authority of congress over interstate commerce. It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of congress on the subject, and ceases when congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by congress of the law in question was an assertion of its power, by the fact alone of such manifestation, that subject was at once removed from the sphere of the operation of the authority of the state. To admit the fundamental principle and yet to reason that because congress chose to make its prohibitions take effect only after a year, the matter with which congress dealt remained subject to state power, is to cause the act of congress to destroy itself; that is, to give effect to the will of congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute.'

The same court, on the 15th of January, last, handed down another opinion holding that the federal statute regulating the right of recovery of damages by employes engaged in interstate commerce, was valid as applied to employes of such carriers, whether the employe himself was engaged in handling interstate commerce or not, and operated to supersede all state laws on the same subject. *Edgar G. Mondou* v. *N. Y., N. H. & H. R. R. Co.*, not yet officially reported. In the last case Mr. Justice Van Devanter quoted approvingly from the Solicitor-General's brief as follows:

> 'Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical and less secure. Therefore, congress may legislate about the agents and instruments of interstate commerce, and

about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act.'

Of course congress and the corporation commission of the state acted upon the subject-matter embraced within order No. 148 upon the theory that such action promoted the reliability of promptness or economy or security or utility of the commerce of the common carrier or their patrons affected thereby, otherwise, there would have been no justification for the exercise, and as the plaintiff in error herein happens to be an interstate railway engaged in the transportation of interstate commerce, congress having entered that legislative field, the states must stay out or having entered prior to congressional action, must retire.

It seems very clear that the imposition of a fine of $500 for contempt predicated upon the violation of order No. 148, in view of the federal statute covering precisely the same subject-matter, constitutes a direct burden upon interstate commerce, and for that reason is repugnant to the commerce clause of the constitution of the United States. The attorney general did not touch upon the foregoing phases of the case in his brief or argument, but our own research together with the array of authorities presented by counsel for the plaintiff in error irresistibly leads to the conclusion reached. Mr. Justice McKenna in discussing the effect of the penalty

clause of the North Carolina statute, in *Southern Ry. Co.* v. *Reid, supra,* says:

> 'If a penalty of $50.00 for refusing to receive freight 'when tendered' be no burden on interstate commerce beyond the power of a state to impose, would a penalty of $100 or $1,000 likewise be no burden? May not the power which is competent to impose a penalty select its amount? The penalty of the North Carolina statute, it is to be remembered, is independent of the damage received, and what excuses or defenses may be offered the decisions of the court leave in doubt. The statute seems to permit none. The case at bar illustrates somewhat its peremptory character, and the case which was argued with this (*Southern Railway Company* v. *Reid and Ream*) still more so. The plaintiffs in that action sued for $750.00 for refusal to receive and forward a carload of shingles, and recovered $350.00, although one of them testified that they 'never lost a cent.' The circumstance was declared by the court, citing a prior case, to be immaterial, as the penalties were not given wholly on the idea of making pecuniary compensation to the party injured, but usually for the more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment. The policy of the statute, then, is to require the acceptance of freight 'when tendered,' with daily accumulating penalties upon refusal to do so. If such power be conceded, what is the limit of its exercise, either as to conditions or penalties?'

The order of the corporation commission herein involved must be reversed, and the cause remanded with directions to dismiss the contempt proceeding.

All the Justices concur."

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1911.

130	Knott *et al.* v. C. B. & Q. R. Co.
134	C. B. & Q. R. Co. v. Knott *et al.*
672	Knott *et al.* v. St. L. & S. F. R. Co.
673	St. L. & S. F. R. Co. v. Knott *et al.*
674	Knott *et al.* v. A., T. & S. F. R. Co.
675	A., T. & S. F. R. Co. v. Knott *et al.*
676	Knott *et al.* v. St. L. S. W. R. Co.
677	St. L. S. W. R. Co. v. Knott *et al.*
678	Knott *et al.* v. C. R. I. & P. R. Co.
679	C., R. I. & P. R. Co. v. Knott *et al.*
680	Knott *et al.* v. St. L., K. C. & C. R. Co.
681	St. L., K. C. & C. R. Co. v. Knott *et al.*
682	Knott *et al.* v. K. C. So. R. Co.
683	K. C. So. R. Co. v. Knott *et al.*
684	Knott *et al.* v. St. L. & Hannibal R. Co.
685	St. L. & Hannibal R. Co. v. Knott *et al.*
686	Knott *et al.* v. Mo. Pac. R. Co.
687	Mo. Pac. R. Co. v. Knott *et al.*
688	Knott *et al.* v. St. L., I. M. & S. R. Co.
689	St. L., I. M. & S. R. Co. v. Knott *et al.*
690	Knott *et al.* v. M. K. & T. R. Co.
691	M., K. & T. R. Co. v. Knott *et al.*
692	Knott *et al.* v. Q. O. & K. C. R. Co.
693	Q., O. & K. C. R. Co. v. Knott *et al.*
694	Knott *et al.* v. Wabash R. Co.
695	Wabash R. Co. v. Knott *et al.*
696	Knott *et al.* v. St. J. & G. I. R. Co.
697	St. J. & G. I. R. Co. v. Knott *et al.*
698	Knott *et al.* v. K. C., C. & S. R. Co.
699	K. C., C. & S. R. Co. v. Knott *et al.*
700	Knott *et al.* v. C. G. W. R Co.
701	C. G. W. R. Co. v. Knott *et al.*
702	Knott *et al.* v. C., M. & St. P. R. Co.
703	C., M. & St. P. R. Co. v. Knott *et al.*
704	Knott *et al.* v. C. & A. R. Co.
705	C. & A. R. Co. v. Knott *et al.*

Supreme Court
of U.S.
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JAMES H. McKE

MISSOURI RATE CASES.

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Appeals Nos. 130, 672-704 (even numbers) and Cross Appeals No. 134 and Nos. 673-705 (odd numbers) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

REPLY BRIEF FOR RAILROAD COMPANIES, APPELLEES AND CROSS APPELLANTS.

FRANK HAGERMAN,
Solicitor for all railroads, Appellees and Cross Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1911.

130	Knott *et al.* v. C. B. & Q. R. Co.	MISSOURI RATE CASES.
134	C. B. & Q. R. Co. v. Knott *et al.*	
672	Knott *et al.* v. St. L. & S. F. R. Co.	
673	St. L. & S. F. R. Co. v. Knott *et al.*	
674	Knott *et al.* v. A., T. & S. F. R. Co.	
675	A., T. & S. F. R. Co. v. Knott *et al.*	
676	Knott *et al.* v. St. L. S. W. R. Co.	
677	St. L. S. W. R. Co. v. Knott *et al.*	
678	Knott *et al.* v. C. R. I. & P. R. Co.	
679	C., R. I. & P. R. Co. v. Knott *et al.*	
680	Knott *et al.* v. St. L., K. C. & C. R. Co.	
681	St. L., K. C. & C. R. Co. v. Knott *et al.*	
682	Knott *et al.* v. K. C. So. R. Co.	
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686	Knott *et al.* v. Mo. Pac. R. Co.	
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689	St. L., I. M. & S. R. Co. v. Knott *et al.*	
690	Knott *et al.* v. M. K. & T. R. Co.	
691	M., K. & T. R. Co. v. Knott *et al.*	
692	Knott *et al.* v. Q. O. & K. C. R. Co.	
693	Q., O. & K. C. R. Co. v. Knott *et al.*	
694	Knott *et al.* v. Wabash R. Co.	
695	Wabash R. Co. v. Knott *et al.*	
696	Knott *et al.* v. St. J. & G. I. R. Co.	
697	St. J. & G. I. R. Co. v. Knott *et al.*	
698	Knott *et al.* v. K. C., C. & S. R. Co.	
699	K. C., C. & S. R. Co. v. Knott *et al.*	
700	Knott *et al.* v. C. G. W. R Co.	
701	C. G. W. R. Co. v. Knott *et al.*	
702	Knott *et al.* v. C., M. & St. P. R. Co.	
703	C., M. & St. P. R. Co. v. Knott *et al.*	
704	Knott *et al.* v. C. & A. R. Co.	
705	C. & A. R. Co. v. Knott *et al.*	

Appeals Nos. 130, 672-704 (even numbers) and Cross Appeals No. 134 and Nos. 675-705 (odd numbers) from the Circuit Court of the United States for the Western Division of the Western District of Missouri.

REPLY BRIEF FOR RAILROAD COMPANIES, APPELLEES AND CROSS APPELLANTS.

It is impossible to answer every assertion and argument made in the various lengthy briefs presented herein by the state. Without attempting to follow the order of presentation adopted in the or-

iginal brief, we will briefly reply to some of the suggestions made. Confusion necessarily exists because of the many different briefs filed for the state. Attention herein will however be directed to two only of these briefs, one designated "State's Brief, Cases Nos. 672-701," and the other "State's Supplemental Brief, Cases Nos. 130, 134," these being the two new briefs filed for this hearing. They were received too late to be answered as to every detail. The references to the single brief, covering the entire case, heretofore filed for the railroads, will be by the words "Original Brief."

I.

The state rates necessarily interfered with interstate commerce.

This question is squarely presented by the record. The method in which it arose, and the facts relating thereto, have been heretofore fully considered (Original Brief, Div. V., pp. 263-273). It has been made the subject of a separate elaborate discussion by Mr. Gardiner Lathrop, to whose brief, reference is again made. The briefs in the Kentucky, Minnesota and Oregon cases likewise exhaustively deal with the question, so that the subject may be here left as one already so fully covered that nothing more need be added.

II.

Alleged general legal principles which the state claims govern the determination of the question of confiscation.

(a) These principles (State's Brief Cases Nos. 672-701, pp. 106-109; State's Supplemental Brief, Cases Nos. 130, 134, pp. 66-69) are outlined in twelve propositions, of which the first six need no discussion, for they, reduced to a sentence, mean that which need not be here controverted i. e.: the state has power to fix *reasonable* maximum rates, so that when fixed they are presumptively valid, the burden being upon the railroads to clearly prove that they are confiscatory, the doubts, if any, being resolved in favor of the state.

(b) It is by counsel also said:

> "VII. The case is heard and the questions determined *de novo* by this court and without regard as to how the questions were found and determined by the trial court. *Knoxville* v. *Knoxville Water Co.*, 212 U. S., 1."

This statement is entirely too broad, and is not sustained by the case cited. Even if this court be not *conclusively* bound by the finding of fact made below, yet presumptively (*Shepard* v. *Nor. Pac. R. Co.*, 184 Fed. Rep., 765, 808, 809) that finding is correct. Under the special circumstances of these cases more than ordinary weight should be given to the findings below, and they should stand unless "obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence." This subject has been fully considered (Original Brief, Div. II, pp. 117-129) and the arguments advanced need not again be repeated.

(c) It is also by counsel said:

> "VIII. The rates, both freight and passenger, and business of the road in the state, may be considered in their entirety. *San Diego Land and Town Co.* v. *National City*, 174 U. S., 739."

This proposition is not conceded. As it is of some considerable importance, it will hereafter be given (*Infra*, Div. V) separate consideration.

(d) It is also asserted:

> "IX. The road may be compelled to carry an article or articles at cost or even at a loss if the return on its entire business in the state affords it a reasonable compensation. *Northern Pacific Ry. Co.* v. *North Dakota*, 216 U. S., 579."

This is not true. While the proposition has no bearing upon these cases, it is as an abstraction wrong. It therefore should not be conceded to be sound. An unreasonable rate upon one commodity can be attacked regardless of the reasonableness of a return from a body of rates (*R. R. Com.* v. *Cumberland Telephone & Telegraph Co.*, 212 U. S., 414, 420, 53 L. Ed., 577; *Atlantic Coast Line* v. *North Carolina R. R. Com.*, 206 U. S., 1, 51 L. Ed., 933.)

(e) It is next asserted:

> "X. The road must affirmatively advise the court what it has done with the receipts and earnings of the company on its entire business in the state, and must not only give the amount showing the disposition of its revenues, but must give the items thereof, its expenses in general statements and in large sums will not be accepted, lest the court be misled into doing grievous wrong to the public. *Chicago & Grand Trunk R. R. Co.* v. *Wellman*, 143 U. S., 739."

This is too broad a statement of the law as declared in the case cited. The proposition is another abstraction because, here the receipts and expenses were tabulated and given to the state's experts long before the trial. They had every facility extended and every opportunity to test the same (Original Brief, Div. II,

pp. 117-122) of which they availed themselves. These experts, as heretofore shown in detail, (id., pp. 238-241) testified to the correctness of the figures. Moreover, the court below *by consent* appointed (Rec., 174) two experts from each side who made a joint report (Rec., 175-212) setting forth, as correct, the exact figures claimed by the railroads. They left as the only difference between the parties, one of theories.

(f) It is next asserted:

> "XI. The service rendered by the road is an element which must be considered in determining the questions, because the road can only demand what the 'services rendered by it are reasonably worth.' *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S., 257; *Smyth* v. *Ames*, 169 U. S., 466."

This is another mere abstraction. No question of service was below involved, presented or considered. No error in relation thereto is assigned, no fact concerning same discussed. The attack was upon a body of rates and not upon a rate upon a particular commodity (*R. R. Com.* v. *Cumberland Telephone & Telegraph Co.*, 212 U. S., 414, 420, 53 L. Ed., 577; *Atlantic Coast Line* v. *North Carolina R. R. Com.*, 206 U. S., 1, 51 L. Ed., 933).

(g) It is also said:

> "XII. Each case must be heard and determined upon its own particular facts and evidence. Reduction in rates does not necessarily mean reduction in revenue. They may have increased business volume and therefore increased earnings. *Smyth* v. *Ames*, 169 U. S., 466; *Chicago, Grand Trunk R. R. Co.* v. *Wellman*, 143 U. S., 739; *St. Louis, San Francisco R. R. Co.* v. *Gill*, 156 U. S., 649."

This must refer to the passenger, not to the freight rate, but as to that passenger rate the temporary injunctions were denied

and tests were made from actual experience. Moreover this distinct finding (Finding 10, Rec., 5310, 5311) appears:

> "After the adoption of the two cent fare statute, there was no substantial increase in travel. For a few weeks there was a small increase largely brought about by interstate passengers buying (Rec., 5311) tickets to state lines, and in part by the novelty. What if any increase of travel occurred by reason of said two cent fare, would be a mere approximation. It has not been substantial, and there is no reason to believe that any such increase will be brought about in the future by a two cent fare."

The proof overwhelmingly sustained this finding (Ev. Nay, Rec., 4456-4474; 4960-4970; Exhibits 47-56, Rec., 4960-4970; Ev. Peabody, Rec., 4410-4418, Exhibits 38, 40, Rec., 4931-4934; Ev. Stone, Rec., 4480-4482; Ev. Bethard Rec., 4077-4098). As to the freight business, the act of 1905 need not be considered, for that was repealed (Original Brief, pp. 102-109). The act of 1907 fixed new freight rates. A temporary injunction was, *by consent*, granted against its enforcement (Finding 6, Rec., 5308; Original Brief, pp. 111-112, Div. i, Subd. v; Div. 11, Subd. 4, pp. 127, 128). In these circumstances there is no possibility that there would have been any increase of business; otherwise the state would not have so consented. Moreover, each statement of the state's expert (Exhibits 61, 76, 79, 80, 85, 91, 103, 108, Rec., 4987, 5022, 5040, 5057, 5079, 5102, 5115) conceded and included the diminution in earnings which the reduced freight rates would have caused. The joint experts *all* reported (Rec., 175-212) the same as a conceded fact (Original Brief, Div. III, Subd., 6, pp. 198-201). The court below (Finding 15, Rec., 5314) thus found the facts:

> "And from their own statements upon the basis adopted herein for making such accounting by the court, the freight business for the period mentioned would have been at a loss

if the statutory rates had been observed, and the passenger business was done at a loss under the two cent fare statute."

At another place in the brief (State's Brief, Cases 679-701, p. 120; Cases 130, 134, p. 80) this diminution is admitted to be correct. Such express admission is made in each tabulation made (State's Brief, Cases 679-701 pp. 138, 140, 149, 161, 163, 165, 172, 173, 185, 188, 190, 197, 198, 211, 214, 216, 222, 224, 236, 238, 240, 242, 249, 250; Cases 130, 134, pp. 97, 105, 107, 108). So the court expressly found (Finding 8, Rec., 5310) "the diminution of earnings upon the commodities covered by the freight rate statutes of 1905 and 1907 if the rates thus fixed had been charged." The sums so found appear in finding 19 (Rec., 5318-5326.)

III.

State's summary of rate cases heretofore decided here.

Counsel (State's Brief, Cases 672-701, p. 110; Cases 130-134, pp. 70) say this:

> "B. In three cases only has this Honorable Court held rates fixed by legislative bodies for public service corporations confiscatory. In each of the three cases the facts were either admitted or not seriously controverted. This court, on the other hand, has refused to hold such rates invalid on account of being unreasonable and confiscatory in thirteen or more cases."

Here follows a review of several cases, many of which involved the validity of a single rate, as distinguished from a body of

rates. No good will be subserved by following this review, because from that which is said, counsel make no particular application of any of these cases further than contending that the corporations lost a majority of the cases so cited.

IV.

Factors necessary to a determination of the question of confiscation.

Counsel (State's Brief, Cases 672-701, p. 119; Cases 130-134, p. 79) use this heading:

> "C. Factors necessary to know in order to determine whether or not the rates, both freight and passenger, are confiscatory or afford a reasonable return."

They then (State's Brief, Cases 672-701, pp. 119-120; Cases 130, 134, pp. 79-81) enumerate these factors:

> "Necessary Factors: 1. The reasonable value of the properties employed in the business. 2. The reasonable value of the properties less the franchise. 3. The amount of the value assignable to State freight traffic. 4. The amount of the value assignable to State passenger traffic. 5. Gross amount of revenue received. 6. The gross amount of revenue received from State freight traffic. 7. The gross amount of revenue received from State passenger traffic. 8. Total amount of expense. 9. Amount of expense assignable to State freight traffic. 10. Amount of expense assignable to State passenger traffic. 11. Taxes assignable to freight traffic. 12. Taxes assignable to passenger traffic. 13. Amount of dimunition in revenue if freight acts had been in effect."

(a) With the exception of the second of these factors there is no difference between the parties, for, as we understand, when put in simple form, they mean this: After ascertaining the reasonable value of all property in the state, there shall be assigned to the state freight and state passenger business respectively, some fair proportion thereof as the assignable value. Six per cent thereon represents the very least sum which either class of business is entitled to earn. The gross earnings in the state and also those thereon from each class of business are then ascertained. From these are deducted the expenses. In case of state freight there is also deducted the diminution in freight earnings which would have existed had the new rates been put in force.

(b) It is suggested (State Brief Cases 679-701 p. 120) that the roads must prove that the division made of expenses as between state and interstate business is fair and correct. The revenue method of division was the main point of contest below. The proof thereof was overwhelming (Orig. Brief pp. 194-198) and that theory was not only correctly adopted below (id. 193) but has the full support (id. 181-192) of the decided cases and was expressly found (Finding 8, Rec., 5310) to be fair.

(c) It is next said (id. p. 121) that the railroads did not affirmatively and specifically prove that their expenses were necessary and reasonable for operation, not for betterments, and the management was economical. Counsel can scarcely be serious about this. Upon the hearing before the master as to the act of 1905, there was the utmost detail as to each item of expense, that it was necessary, reasonable and for operation, and that the management was economical. At the trial the rates under the acts of 1907 were involved and this course was pursued: Each railroad made out complete statements for certain test periods and in advance delivered same to the state's experts. The latter had every opportunity and took all the time desired to actually examine the books and accounts of each company (Original Brief, pp. 118, 121). The

railroad figures were thereupon, by these experts (id. 175, 181, 238-241) conceded to be correct, and incorporated in their own statements. No differences of any kind arose between the parties save and alone as to the method of dividing expenses and the extra expense of doing state business (id. 180, 181). So the court below stated in its opinion (Rec. 5300-1) and epecially found (Finding 6, Rec., 5309) the facts. As hereafter demonstrated there is no doubt of the proposition that the sole difference between the parties is as to theories.

V.

Shall confiscation be determined by a consideration of the entire state business?

The state now so contends (State's Brief, Cases 672-701, p. 109; State's Supplemental Brief, Cases 130, 134, p. 68) by thus stating its proposition:

> "VIII. The rates, both freight and passenger, and business of the road in the state, may be considered in their entirety. *San Diego Land and Town Co.* v. *National City*, 174 U. S. 739."

(1) We are not willing to concede as a rule that all state earnings must be considered to see if there is a fair return upon *all* state business before a rate upon a distinct and substantial class of business like freight or passenger carriage can be held to be confiscatory. This court has never yet so decided. Each of these classes is so substantial and of such a separate nature that the state here has, as always seems to have been the case, legislated upon

them as separate and distinct classes. It has, however, been decided as to partial freight carriage that unless the entire return upon the state freight carriage business is confiscatory, it is immaterial that there may be confiscation by a single rate upon a single commodity (*M. & S. L. R. Co.* v. *Minnesota*, 186 U. S., 257, 267, 46 L. Ed. 1151, 1157).

(2) In view, however, of the facts here, and the ***insistence of the state,*** no trouble can arise if the entire business should be considered. The freight act of 1907 increased to *some* extent the freight rates fixed by the act of 1905. Concurrently therewith, and as part of the same legislative transaction, the passenger rates were lowered, so that there was as a whole a substantial reduction in state rates. The supplemental bills so averred. They also stated that whether freight and passenger business were considered jointly or separately, there was confiscation. The argument already advanced (Original Brief, Div. 1, subd. e, pp. 116, 117; Div. III, subd. 10, pp. 234-236) shows that treating the rates as a whole, there is confiscation. No passenger return equaled six per cent, so that it is absolutely necessary for the state, ***but not for the railroads,*** to combine both freight and passenger in order to make a pretense of confiscation. After so making the combination, the state is also, before confiscation can be claimed, required to figure expenses upon a ton and passenger mile basis; even after so doing, it must reduce the extra cost upon state freight to the unheard of amount of 30 to 50 per cent upon a ton mile basis and assert, contrary to the finding below and the overwhelming weight of evidence, that the interstate passenger expense cost from 10 to 20 per cent *more* than the state.

(3) In the cases heretofore decided, it seems to have been assumed that if the entire state freight business was, irrespective of any other class, done at a loss, the legislation as to the rates upon that business must fall (*Ames* v. *Union Pacific R. Co.*, 64 Fed. Rep. 165; *Smyth* v. *Ames*, 169 U. S., 446, 42 L. Ed., 819; *C.*

M. & St. P. R. Co. v. *Tompkins,* 176, U. S. 167, 44 L. Ed. 417, subsequently below, 110 Fed. Rep. 473; *Nor. Pac. R. Co.* v. *Keyes,* 91 Fed. Rep. 47). A like course was pursued when passenger rates were separately fixed and attacked. (*Penn. R. Co.* v. *Philadelphia County,* 220 Pa. 100, 68 Atl. Rep. 676; *Central R. Co.* v. *Northampton* County, 11 Northampton Co. Rep. 342; *Buell* v. *C. M. & St. P. R. Co.,* Wisconsin R. R. Com. Rep. 1907, p. 179). In the Nebraska case (*Ames* v. *Union Pac. R. Co.,* 64 Fed. Rep. 165; *Smyth* v. *Ames,* 169 U. S. 466, 42 L. Ed. 819) it was expressly said that gains from interstate freight business should not be permitted to offset the losses upon the state freight business. In *Central R. Co.* v. *Northampton Co.,* 11 Northampton Co., Ct. 172, it was explicitly decided that in the attack upon the state passenger rates, the losses should not be aided from the gains either from the interstate or state freight business. In the Oklahoma case, Judge Hook (*M. K. & T. R. Co.* v. *Love,* 177 Fed. Rep., 493, 497, 498) at the circuit, and Judge Sanborn upon appeal (185 Fed. Rep., 321, 328) assumed that the state passenger and freight business should be separately considered. Mr. Justice Van Devanter, as Circuit Judge, in the Arkansas case (*In Re Arkansas Rates,* 163 Fed. Rep. 141), Judge Trieber upon final hearing thereof (187 Fed. Rep. 290) and Judge Sanborn in the Minnesota case (*Shepard* v. *Northern Pac. R. Co.,* 184 Fed Rep. 165) at least assumed that this view was correct, because the findings were separately made and confiscation separately considered as to each of the two classes of business. In each of these instances, however, the rates considered separately, were confiscatory. Hence, combined, they were necessarily so. This seems to be just and fair, and was the course that was below in these cases pursued by both parties at the trial, for both there submitted their statements, showing *separately* the loss upon each of the two classes of business. This clearly appeared from the statements of each of the railroads served upon the state long before the trial, and those of the state's experts submitted as

their theory of each case (St. L. & S. F. Ex. 2, Rec., 4790; State's Ex. 61, 64, Rec. 4984, 4986; A. T. & S. F. Ex. 45, Rec. 4939; State's Ex. 77, Rec. 5022; C. R. I. & P. Ex. 78, Rec. 5026; State's Ex. 80, 81, Rec. 5039, 5043; K. C. S. Ex. 82, 83, Rec. 5043, 5055, State's Ex. 85, 86, Rec. 5056, 5058; St. L. & H. Ex. 87, 88, Rec., 5060, 5064, admitted, Rec., 196, to be correct; M. K. & T. Ex. 89, Rec.,5065, State Ex. 91, 92, Rec., 5079, 5081; C. B. & Q. Ex. 98-102, Rec. 5090-5100; State's Ex. 103, 104, Rec. 5101, 5105; K. C. C. & S. Ex. 93, 93a, Rec. 5080, 5082, admitted, Rec. 196, to be correct; C. G. W. Ex. 106, 107, Rec. 5106, 5115, State's Ex. 108, 109, Rec. 5115, 5118). Each one of these statements treated separately and in no other way the state freight and passenger business. The state's figures, however, combined miscellaneous freight with freight carriage and mail and express with passenger business. The first suggestion of combining the freight and passenger business and that only implied, was when the joint experts selected by consent (Rec. 174), made their joint report (Rec. 175-212) of the figures upon each theory. They not only made separate statements as to each class of business, but also added the two together, showing the combined result. This seems not to have been because of anyone's contention, because in none of the assignments of error by the state (Rec. 5257-5264, Original Brief, 38, 72) or railroads (Rec., 5334-5336) is the suggestion made that the state business should be considered as a whole. Such being the theories upon which the parties proceeded below, it is probably now too late to change front.

(4) If, however, the entire state business were considered as a whole, there would not be a sufficient return, if expenses be divided upon the revenue basis. This has in detail (Original Brief, pp. 235-6) been demonstrated. The court below (Finding 16, Rec. 5314) thus expressly found such to be the fact.

> "As to each of the nine companies whose cases have been submitted, the earnings and expenses and all other items are

different in amount, so with the returns upon value to which the company is entitled. But in no event in any of the cases tried would the freight earnings, after making the deductions herein found, result in a return to any company of more than three per cent. With nearly every company an actual deficit is shown if the 1907 statute had been in force. So under the two cent fare statute a deficit as to nearly all of the companies, and not more than two per cent in case of any company. *If the freight and passenger business should be combined with the miscellaneous of each class, there would be a deficit as to some and not to exceed three per cent as to any of the others."*

The question becomes immaterial, if the view taken below be correct, i. e., a fair and just result is reached if first division of expenses should be upon the revenue basis and to the state's part thereof should as to the three roads, St. L. & S. F., A. T. & S. F., and K. C. S., be added the minimum allowance estimated by the state as extra cost. When this is done all roads fail to obtain a six per cent return, whether the different classes of business be considered separately or as a whole. Without any extra cost only three roads receive that much upon the business as a whole (Original Brief, pp. 234-5), and if these three be charged with extra at the minimum estimate of the state experts, upon the state freight business alone, no company can obtain a six per cent return upon its entire state business.

VI.

Reasons why the state now tries to consider the business as a whole.

(a) The passenger business considered separately upon no theory brought a six per cent return. If the expenses of the

passenger carriage business be divided upon the basis of revenue according to the railroad contention, allowing *nothing* for extra cost, there is no such return. This clearly appears from special finding 19 (Rec. 5317-5327); and has already been shown (Original Brief, pp. 99-101, 201). Without extra cost, there is no return whatsoever received by the C. R. I. & P., St. L. & H., K. C. C. & S., and C. G. W. The C. B. & Q. received 1.79%, K. C. S. 2.6%, M. K. & T. 3.18%, St. L. & S. F. 3.54%, and A. T. & S. F. 5.49%.

(b) There is not, except as to the A. T. & S. F. any such return without extra cost, even if there be combined the state passenger carriage with the mail and express business, as divided by the state, and even if expenses be fixed upon the passenger mile basis according to the state's contention. This plainly appears from the report (Rec., 175-212) of the joint experts selected by consent, as well as by the statements made by the state's experts (Exhibits 64, 76, 80, 85, 91, 104, 108, Rec. 4982, 5020, 5038, 5056, 5077, 5103, 5115). A compilation of the percent of returns upon the passenger business without any extra cost, compiled from finding 19 and the joint report (Rec. 175-212) upon the respective theories, shows this:

Case No.	Road	Railroad Theory	State Theory
672-3	St. L. & S. F.	3.54% (Rec. 5318)	4.81% (Rec. 179)
674-5	A. T. & S. F.	5.49 (Rec. 5319)	7.80 (Rec. 183)
678-81	C. R. I. & P.	0.00 (Rec. 5320)	0.00 (Rec. 188)
682-3	K. C. S.	2.60 (Rec. 5321)	3.65 (Rec. 194)
684-5	St. L. & H.	0.00 (Rec. 5322)	0.00 (Rec. 196)
690-1	M. K. & T.	3.18 (Rec. 5323)	4.56 (Rec. 200)
130, 134	C. B. & Q.	2.11 (Rec. 5324)	4.06 (Rec. 205)
698-9	K. C. C. & S.	0.00 (Rec. 5325)	0.00 (Rec. 207)
700-1	C. G. W.	0.00 (Rec. 5326)	0.36 (Rec. 211)

From this it is to be observed that even upon the state's basis, without extra cost, the only road receiving as much as a six per cent return is the A. T. & S. F., which has 7.80 per cent. The figures are (Rec., 183) $33,198.96, as the return upon $224,817.60, or six per cent semi-annual return upon the assignable value of $849,635.-22. If there be deducted the court's finding (Rec. 5319) of extra cost, $17,947.71 on the passenger carriage business alone, the return as claimed by the state would be less than six per cent. To obtain a six per cent return for the other roads, the state estimates that it costs from 10% to 20% *more* to do the state than the interstate business. In this way alone loss is figured as a part of the roads. The extra cost of the state passenger business was at least 25% more than the interstate. So it was proved (Original Brief, pp. 210-219) and found below (Finding 7, 8, Rec., 5309, 5311).

(c) Confiscation as to the A. T. & S. F. clearly appears *without extra cost*, if there be taken the state's combination of the passenger carriage business with the mail and express, and expenses be apportioned upon the revenue basis. The passenger carriage earnings are $104,370.19 (Finding 19, Rec., 5319). Added to the mail and express earnings $51,320.16 (Rec., 183), as claimed by the state, makes the total earnings (Rec., 183), $155,690.35. The revenue percentage of state passenger carriage is (Rec., 5316) 15.22%; of state mail and express, as divided by state, it is (Rec., 159) 7.48%, making a total of 22.70% The total passenger expenses, including taxes and rentals are, (Rec., 5317) $583,021.24. Taking 22.70% thereof, the result is $132,065.82, which, from the earnings, leaves $23,624.53. The amount upon the state's theory (Rec., 183) which it is entitled to receive is $25,489.05, which is 6% upon a valuation of $424,-817.61 (Rec., 183) or 3% for six months upon $849,635.22. These figures, due upon the state's theory, are the same as the return found upon the state carriage business, $17,068.16 (Rec.,

5319) plus that due, $8,240.90 (Request 22, Rec., 159) upon the miscellaneous business as divided by the state.

(d) As to freight separately considered, confiscation clearly appears. This, without extra cost (Original Brief, p. 201) as to all the roads except the St. L. & S. F., A. T. & S. F., and K. C. S. and as to them with the minimum of extra cost (Original Brief 219) estimated by the state at 30%.

(e) To obtain its result, the state must first combine the freight carriage with the miscellaneous business. The expenses are then divided upon a ton mile basis, thus reducing the expenses of the state business about one-half. After a minimum sum is thus obtained, upon the basis of equal cost, there is allowed an extra cost of 30 to 50 per cent, ascertained upon a ton mile basis; from the passenger returns there is deducted an alleged extra cost of 10% or 20% for interstate business over the state. When the freight and passenger returns are thus separately ascertained to overcome the losses still existing as to the passenger business, both are combined and then the claim is made that as a whole the state rates are confiscatory. The theory is too complicated and unreasonable to be adopted.

VII.

The franchise value alleged to have been erroneously included in the valuation.

(a) The values found below (Finding 11, Rec. 5311) were, with two exceptions hereinafter noted, exactly three times the assessed value fixed by the state assessing board, and in the exact figures *estimated* by the state assessing board *as the actual value*. All property in the state of individuals was actually assessed at a

small percentage of the real value thereof. To make the railroad assessments upon the same basis as this property of individuals that board, had to, and did, make them in like proportion. So the values were ascertained and then the assessments made at some percent thereof. The findings below were, with the exception of the St. L. & H. (Nos. 684-5) and K. C. C. & S. (Nos. 698-9) exactly three times the amount of the assessment, and exactly equal to the value as estimated by the board. These assessments appeared (Exhibits A-1, Rec., 5118-5228) as well as the stipulations of the parties (Rec. 752-1039, 4634, 4942, 5191-5224) that they were at one-third of the board's estimated value, and did not include a large amount of each road's property assessed locally, and not within the jurisdiction of the state board.

(b) The finding of value did not, as contended, rest upon the assessments and stipulations. Hence, for this reason, if there were no other, the foundation of the state's contention does not exist. W. B. Doddridge, an expert of vast experience testified (Rec., 4463, 4468, 4490, 4491, 4780, 4781) that with the exception of the St. L. & H. and K. C. C. & S., each railroad was actually worth three times the amount of the assessment, and each of those two roads so excepted was worth twice such amount. Not only was such statement undisputed, but there was ample other evidence (Original Brief, pp. 146-153) to sustain the opinion thus expressed. Moreover, as hereafter shown, the state's experts accepted the figures as correct and used them in all statements expressing their theories of the case. The court below did not, as assumed by the state, find the values from the assessment and the stipulation, but made the findings wholly irrespective thereof, finding 11, (Rec., 5311) reciting:

> "But aside and apart from the valuation thus fixed by the state board, these findings are that upon the whole evidence said properties are at least of the values above fixed."

So in the opinion (Rec. 5302) Judge McPherson said:

> "There is no evidence that any of the existing bonds were improperly issued either as to amounts or rates of interest. In fixing the value the court has considered the evidence of witnesses as to the stock and bonds outstanding, and the court has considered the evidence of the fact that the Missouri State Board for taxing purposes has valued these properties. Of course, those findings are not binding nor conclusive, but they are persuasive. But independently of stocks and bonds, and ***independently of what the State Board has valued these properties for taxing purposes,*** the evidence shows the valuations to be as recited in the findings of fact herewith filed, and to which reference will be made in the decrees."

(c) Erroneously ***assuming*** that the value was below found by ***arbitrarily*** taking the assessment and multiplying it by three, it is now claimed (State's Brief, Nos. 672-701, pp. 126-130, 152-156-176-180, 202-206, 228-232, 254-258; Cases 130, 134, pp. 82-86) that there should be deducted from the total of each assessment a part thereof erroneously called "franchise value." This subject has been heretofore considered (Original Brief, Div. III, subd. 2, par. f, pp. 154-155). It is based upon the misconception that the finding below arbitrarily adopted the assessment without proof of value or that the assessment included a specific franchise value.

(d) Such a position must below have been assumed at the final argument, for there, as already seen, it was specifically denied by finding 11 (Rec., 5311), and the subject was referred to by the court in its opinion (Rec., 5302). At no place in the record, however, does the point appear to have been made. No deduction upon any such account was made by the railroad auditors. Each of their statements fixed the total value at exactly three times the amount of the assessment, and took a revenue proportion as the assignable value (Exhibits 2, 45, 79, 82, 83, 87, 88, 93, 93a, 89, 98-102, 106, 107 Rec. 4790, 4939, 5026, 5037, 5043, 5055, 5060,

5064, 5065, 5080, 5082, 5090, 5101, 5106, 5115). The state experts in their statements as to their theories of the case likewise fixed the amount at the same figures, and upon the same basis (Exhibit 61, 64, 76, 78, 80, 81, 85, 86, 91, 92, 103, 104, 108, 109, Rec., 4987, 4988, 5022, 5025, 5040, 5041, 5057, 5060, 5079, 5081, 5102, 5104, 5115, 5118). The joint report of experts appointed by consent (Rec. 175) upon both sides, unconditionally so fixed the valuations (Rec. 175-212). It would therefore seem that both parties, at the trial below, so conducted themselves as to eliminate this question from the case.

(e) If, however, there had been below included in the valuation the value of a franchise, this would not have been error, for that is an element always proper to be considered (Original Brief, pp. 132-142).

(f) Counsel do not make plain the ground of their point, so that it might as well be stated for them. The state statute (Rev. Sts. Mo. 1899, Sec. 9339) required each railroad to return to the state board for taxation a list of certain of its property, not all, specifically enumerated. In addition thereto, it was required to return the valuation of "all other property" not so specifically enumerated, exclusive of local real estate, which (Rev. Sts. Mo. 1899, sec. 9360) is assessed locally by the county officers. When the state board assesses, it itemizes the enumerated property and fixes a separate assessment (Rev. Sts. Mo. 1899, sec. 9344) of the item called "all other property." Counsel here erroneously assume these words "all other property" mean "franchise value," nothing else. The assumption has nothing upon which to rest. The language of statutes out of which the contention arises sufficiently argue the question. They read:

> "Sec. 9339. On or before the first day of January in each and every year, the president or other chief officer of every railroad company whose road is now or which shall

hereafter become so far completed and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state auditor a statement, duly subscribed and sworn to by said president or other chief officer, before some officer authorizing to administer oaths, setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or side-tracks, with depots, water-tanks, and turn-tables, the length of such road, double or side-tracks in each county, municipal township, incorporated city, town or village through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, *and all other movable property owned*, used or leased by them on the first day of June in each year, and the actual cash value thereof.

"Sec. 9360. All property, real personal or mixed, including lands, machine and work-shops, round-houses, warehouses and other buildings, goods, chattels and office furniture of whatever kind, owned or controlled by any railroad company or corporation in this state not hereinbefore specified, shall be assessed by the proper assessors in the several counties, cities, incorporated towns and villages wherein such property is located, under the general revenue laws of the state and the municipal laws regulating the assessments of other local property in such counties, cities, incorporated towns and villages, respectively, but the taxes on the property so assessed shall be levied and collected according to the provisions of this article."

The report actually returned to the state board, after specifying certain property, contains (Rec., 5129) the words "all other property" followed by a valuation.

VIII.

Assignable value.

(a) It is suggested, not really argued, that the court below erred in finding the assignable state value upon the basis of revenue

(State's Brief, Cases 679-701, pp. 121, 122; Cases 130, 134, pp. 82-86), counsel among other things, saying:

> "The values we take and use in our examples as assignable to the property engaged in the state traffic are the values assigned by the railroads and accepted by the court. The court committed error in so doing and we do not accept these values as correct. We take them simply to demonstrate even on the roads' and court's own basis the laws are remunerative."

(b) The court below first found the value of the entire property in the state. It then assigned to each class of state busines such proportion of the entire value as the earnings from that class bore to the entire earnings in the state. That this method was correct and has always received judicial approval, has already been (Original Brief, pp. 155-166) the subject of consideration. There is no authority to the contrary.

(c) In the hearing before the master under the act of 1905, the then chief expert, Ludlam (Rec., 2026), thus said this was the correct method:

> "If I made a division, I think I would apportion it on the basis of the gross revenue."

Moreover, each statement submitted by the state's experts (Exhibits 61, 64, 76, 78, 80, 81, 85, 86, 91, 92, 103, 104, 108, 109, Rec., 4984, 4988, 5022, 5025,, 5040, 5042, 5057, 5060, 5079, 5081, 5115, 5119), and the combined statement of the four experts selected by consent (Rec., 174) clearly show (Rec., 175-212) that method of division. So do all the statements made by the railroad auditors (Exhibits 2, 45, 78, 82, 87, 89, 93, 93a, 98, 106, Rec., 4790, 4937, 5026, 5043, 5050, 5060, 5080, 5082, 5090, 5106).

Mr. Taliaferro, chief expert at the final trial, conceded (Rec., 4670, 4673) the correctness of the method. Thirty-two errors are assigned by the state in each of its appeals (Rec., 5257-5264, Nos. 672, 673, p. 218; Nos. 674, 675, p. 220; Nos. 676, 677, p. 204; Nos. 678, 679, p. 217; Nos. 680, 681, p. 217; Nos. 682, 683, p. 209; Nos. 684, 685, p. 201; Nos. 686, 687, p. 244; Nos. 688, 689, p. 234; Nos. 690, 691, p. 250; Nos. 692, 693, p. 216; Nos. 694, 695, p. 210; Nos. 696, 697, p. 206; Nos. 698, 699, p. 202; Nos. 700, 701, p. 217; Nos. 702, 703, p. 200; Nos. 704, 705, p. 206). In none of them was there any claim of error in the method adopted for ascertaining the assignable value. Since both the state and railroad experts presented their cases below upon the theory that this method was correct, it is not conceivable that the court below will be put in error for adopting that theory. This would sufficiently answer the suggestion, regardless of that which has already (Original Brief, pp. 155-166) been said, and regardless of that which heretofore has been decided (id.) in all rate cases heretofore presented.

(d) No figures have been prepared by the state as to the method of making the division, if the revenue basis be not adopted. Presumably that division would be upon the ton and passenger mile basis. Upon the ton mile basis the assignable state freight value would be reduced from 33 1/3 to 66 2/3 (Original Brief, p. 222). For instance, the revenue basis for the A. T. & S. F. (id.) is 6.79%, a ton mile basis 4.34%. The passenger mile basis applied to both the passenger carriage and mail and express is 21.03% (State's Brief, Cases 679-701, p. 132), whereas on the revenue basis, including both classes of business, it is 22.70%. This is thus ascertained: State passenger revenue being $155,690.35 and interstate $530,077.96 makes both $685,768.31, of which the state is 22.70%, the interstate 77.30%. In either case there is a reduction in the assignable value, that in the case of the freight business being most marked. Upon the K. C. S.

(Rec., 5315-5316) the revenue proportion is 4.38%. Upon the ton mile basis, 1.12% (Rec., 5060), or about one-third. No wonder the state would now like to thus fix the assignable value.

(e) We leave the subject of valuation upon the assumption that there is no good reason to recede from the view asserted by both sides and by the court adopted below, and that counsel are really not serious in now suggesting the adoption of a different theory from that presented below.

IX.

Theories of the railroads.

(a) Assuming, as we must, that there is no more difference between the parties upon the subject of assignable values than there was below, the result is that there is no real difference here except as to method of dividing expenses as between the state and interstate business, and the extra cost of doing the state business. We, therefore, re-state the theory of the railroads, and will follow in the next division of this brief, with a restatement of the state's view.

(b) That of the railroads is this: Expenses of any class of business, as between the state and interstate, should in the first instance, be divided upon the basis of revenue (Original Brief, pp. 175-198). When so ascertained they must be deducted from the earnings of that class of business. There should also be deducted the extra cost of doing that part of the state business (Original Brief, pp. 202-209). In the case of state freight, there must also be deducted the diminution in state freight earnings (Original Brief, pp. 198-202) had the enjoined rates been put into effect.

(c) In preparing their statements, the railroads, for the reasons already stated (Original Brief, pp. 233-234) made no division of miscellaneous earnings and expenses, of this more will be hereafter said. (*Infra* Div. XI.)

(d) Suffice it now to say that if the revenue division of expenses is right, there is no doubt of the result. The passenger earnings of no road, when expenses are so charged, will bring a six per cent return (Original Brief, pp. 201-202). This, without extra cost, and whether mail and express be excluded or included. The freight returns, without extra cost, brought (Original Brief, pp. 201, 202) a six per cent return alone to the St. L. & S. F., A. T. & S. F. and K. C. S. If there were deducted the minimum extra cost as estimated by the state's experts at the insignificant 30%, each of these companies (Original Brief, pp. 218, 219) would lose money.

X.

Theory of the state.

(a) The state first arbitrarily divided miscellaneous freight by the revenue percentage of the freight carriage, a method condemned (Finding 15, Rec., 5314, 5315) below as unfair. It then added to the state freight earnings its proportionate part of the miscellaneous earnings so ascertained. This of course proportionately increased the assignable value upon which a return was to be had. It then deducted from all the state earnings thus ascertained, the proportion of all freight expenses that the state ton miles bore to all ton miles, state and interstate. This although ton miles bore no relation to miscellaneous business. It then also

deducted the diminution of state freight earnings and the extra cost of doing state and interstate business estimated at 30% and 50%, the figures fixed by its experts. To show how wide a difference this made between the parties, it is to be noted (Original Brief, p. 222) that, without any allowance for extra cost, there was by this method a deduction of from 33% to 50% in the expenses divided upon the revenue proportion. To make the matter plain the state earnings from storage, switching and demurrage ascertained upon the basis of the carriage business were added to state freight earnings, and although they had no relation to the subject of ton miles, the state expenses to be deducted from the earnings thus found were as a *whole* ascrtained upon a ton mile percentage. The ton mile percentage applied to freight carriage earnings alone reduced the state expenses far more than would have been done by a revenue division. They were still further reduced when spread out so as to be applied not only upon the carriage but upon the miscellaneous business. For instance, to add to the state earnings from any source would *proportionately* increase the expenses if divided upon the revenue proportion, but if divided upon a lesser fixed proportion, the more the earnings are increased the less proportionately become the expenses chargeable thereto. The ton mile proportion thus ascertained made such a difference in the first cost that it makes the only substantial controversy in this case. In no other way can any figures be made from which a claim can be asserted of a reasonable return. If the ton mile percentages be compared with those of revenue on the state freight carriage business plus the miscellaneous as arbitrarily divided by the state's experts, there is a demonstration that the theory is wrong. This is the result of so doing:

Road	Ton mile %	Revenue %
St. L. & S. F.	13.10 (Rec. 4988)	20.66
A. T. & S. F.	4.34 (Rec. 5025)	7.01
C. R. I. & P.	7.61 (Rec. 5043)	18.31
K. C. S.	1.12 (Rec. 5060)	5.10
M. K. & T.	11.00 (Rec. 5082)	17.16
C. B. & Q.	10.62 (Rec. 5103)	19.54
C. G. W.	6.90 (Rec. 5120)	11.39

The figures of the St. L. & H. and K. C. C. & S. are not given because the rates as to these roads were (Rec., 196, 207) conceded to be confiscatory. The foregoing revenue proportion is ascertained by taking the total carriage earnings plus the miscellaneous set forth by the state's experts, the miscellaneous having been by the state divided upon the basis of freight carriage revenue. The percentages are those the state revenue bears to the whole of the freight business, as claimed by the state, i. e., state freight carriage plus the state miscellaneous freight. A simple way to ascertain them is to add the carriage proportions as found (Finding, Rec., 5318-5326) to the miscellaneous proportions set forth in request 22 (Rec., 157-166) and the same result thus appears:

Road	Carriage %	Miscellaneous %	Total
St. L. & S. F.	20.04	00.62	20.66
A. T. & S. F.	6.79	00.22	7.01
C. R. I. & P.	18.02	00.36	18.38
K. C. S.	4.38	00.72	5.10
M. K. & T.	17.01	00.15	17.16
C. B. & Q.	19.28	00.26	19.54
C. G. W.	11.18	00.21	11.39

It has been demonstrated (Original Brief, 223) that by this method of division the ratio of expenses to earnings of state carriage freight ranges from 18% to 49%, whereas the ratio of all freight expenses in the state to all freight earnings therein is 65.71% to 82.88%. So manifestly there is something wrong with the state's method.

(b) When it came to the state passenger business, there were, by the state, added to the carriage earnings those from the state mail and express ascertained erroneously (Finding 15, Rec., 5314, 5315) upon the carriage revenue proportion. The total expenses for the business thus combined were ascertained upon the state passenger mileage proportion. This though the passenger miles had no relation to mail and express as has been demonstrated by Judges Hook (*M. K. & T.* v. *Love*, 177 Fed. Rep., 493, 499) and Sanborn (*Love* v. *A. T. & S. F. R. Co.*, 185 Fed. Rep., 321, 329, 107 C. C. A., 433). If, however, the passenger mile percentages be taken from the record and compared with the revenue proportion of the passenger mail and express business, it would be seen that the state again gets the best of the figures, though it is slight as compared with the advantage obtained in the freight calculations:

Case No.	Railroad	Pass. Mile %	Revenue %
672-3	St. L. & S. F.	59.32 (Rec. 4984)	61.90
674-5	A. T. & S. F.	21.03 (Rec. 4957)	22.70
678-81	C. R. I. & P.	44.28 (Rec. 5040)	50.03
682-3	K. C. S.	25.08 (Rec. 5058)	26.25
690-1	M. K. & T.	41.50 (Rec. 5079)	44.82
130, 134	C. B. & Q.	45.92 (Rec. 5105)	47.55
700-1	C. G. W.	32.06 (Rec. 5117)	42.18

The *St. L. & H. and K. C. C. & S.* again are omitted because the rate is as to them conceded (Rec., 196, 207) to be confiscatory. The foregoing revenue proportions are ascertained by taking the total carriage earnings plus the miscellaneous set forth by the state's experts, the miscellaneous having been ascertained by a division upon the basis of carriage revenue. The figures above set forth are the proportions the state business bears to the whole. A satisfactory way is to take the percentages (Finding 17, Rec., 5315-5316) found below of the state passenger carriage business and add it to

the percentage of miscellaneous as set forth in request 22 (Rec., 157-166), and the same result thus appears:

Road	Carriage %	Miscellaneous %	Total
St. L. & S. F.	51.17	10.74	61.91
A. T. & S. F.	15.22	7.48	22.70
C. R. I. & P.	42.02	8.28	50.30
K. C. S.	19.75	6.50	26.25
M. K. & T.	36.66	8.17	44.73
C. B. & Q.	39.11	8.44	47.55
C. G. W.	29.28	5.21	34.49

Thus it appears that the percentage of state passenger miles, which the state applies to all expenses of the passenger, mail and express business is slightly less than the revenue proportion. The difference is not enough to make the rate reasonable as to any road. So the state was, to get that result, forced to claim that it costs more to do the state passenger than the interstate business. Findings 7 and 8 (Rec., 5309-5310) are to the contrary of this claim and these findings have the overwhelming support of the evidence (Original Brief, pp. 202-219).

(c) If in any case it is desired to ascertain the first or equal cost on the basis of the state's combination of the state carriage and miscellaneous business, it can be done with the foregoing revenue percentages. In every instance the rate is confiscatory as to the passenger business; as to the state freight or combined business it is confiscatory as to every road except the *St. L. & S. F.*, A. T. & S. F. and K. C. S. As to these it is confiscatory with an allowance of the minimum extra cost of state freight as estimated by the state's expert and with no extra cost allowed for the passenger business. (Original Brief, pp. 234-236.)

XI.

The division of miscellaneous business as made by the state, if added to the railroad figures will not change the result.

(a) In the original statements of the railroads, the miscellaneous earnings were not divided. To these statements delivered to the state no objection was made. So the statements were proven and submitted. In the findings (Rec., 5318-5326) made, there was no division as between state and interstate of miscellaneous earnings and expense. At the trial, however, the state's expert for the *first* time suggested the division of the miscellaneous business on the basis of earnings from the carriage business. It was then too late for the railroads to get the actual figures. The state earnings were thus increased. But the state then charged against the combined carriage and miscellaneous earnings the expenses upon the ton and passenger mile basis, whereas neither ton nor passenger miles bore any relation to miscellaneous earnings. The net earnings were, however, thereby largely increased. This subject has already been considered (Original Brief, pp. 233-234). The court below found (Finding 15, Rec., 5313, 5314) that this arbitrary division was quite unfair to the railroads. If, however, the railroad theory be correct, that the assignable value be found and expenses be divided upon a revenue theory, these miscellaneous earnings and expenses cannot, if so calculated, change the result. There will be an increase of assignable value upon which a return is to be had in exactly the proportion of the increase of earnings. There will likewise be an increase of expenses to be charged against the earnings as increased by the combination. This, too, will accord with the revenue. The amount of miscellaneous earnings as divided by the state appear in the state's exhibits 61, 64 (Rec., 4984, 4988), 76, 78, (Rec., 5022, 5025), 80, 81 (Rec., 5040, 5042), 85, 86 (Rec., 5057, 5060), 91, 92 (Rec., 5079, 5081), 103, 104

(Rec., 5102, 5105), 107 and 108 (Rec., 5115, 5118). They are set forth in the joint report (Rec., 175-212) of the experts appointed (Rec., 174) by consent, whose report was made (Finding 14, Rec., 5312, 5313) a special finding. In the court below these figures were compiled into request 22 (Rec., 157-165), wherein the respective percentages were calculated.

(b) At the expense of being tedious, that request will be here set forth. It reads:

> "22. If it should be assumed that the state experts correctly divided miscellaneous earnings as between state and interstate which they did not do, still the fair and reasonable sum to be charged against the state part of these miscellaneous freight and passenger earnings is the revenue proportion of the entire freight and passenger expense plus a minimum extra cost for miscellaneous freight and for miscellaneous passenger. When this done it clearly appears that even without an allowance for extra cost, the result could not be changed if the findings already made as to state freight and passenger had included the miscellaneous, or had the (Rec., 158) miscellaneous of each class been separately considered. In no case would there be any fair return. If miscellaneous were considered separately, or if considered with freight and passenger respectively, the result would not be affected. This clearly appears from a tabulation now made as to each company (with the exception of the St. Louis and Hannibal Ry. Company and the Kansas City, Clinton and Springfield Ry. Co., which are omitted for the reason that the state compiled and submitted no figures for these roads,) showing: (a) The state experts' division of miscellaneous, though in fact it is too favorable to the state. (b) A deduction from earnings of the percentage proportion of expenses to earnings as done in *Smyth* v. *Ames*, 169 U. S., 466, which is the same as the revenue basis. (c) The minimum extra cost now found of doing the state over interstate being a mere fraction less than, and practically the same as, found as to the strictly freight and passenger. (d) The proportion that state's part of the miscellaneous was of all earnings, and the amount of return to which the company was entitled at six per cent interest upon that proportion of the value of the entire property as hereinbefore and now found to be fair, reasonable and just."

(1) St. Louis and San Francisco Railroad Company. (Rec., 158):

Miscellaneous Freight.

Per cent of all freight 00.62%
Per cent of all earnings 00.44%

Miscellaneous Passenger.

Per cent of all passenger 10.74%
Per cent of all earnings 3.10%

	Freight Amount	Passenger Amount
Miscellaneous state earnings	$17,953.25	$125,704.84
Less revenue proportion of expense 00.62% freight, and 10.74% passenger	11,777.44	104,695.30
Leaving	$ 6,775.81	$ 21,009.54
Less increased cost freight 50%, passenger 25%	5,588.72	22,713.23
Leaving	$ 1,187.09	Def. $ 1,703.69
Less Taxes and Rentals	697.20	4,186.41
	$ 489.89	Def. $ 5,890.10
Amount due at 6% interest on portion of value assignable to the state part of the traffic	4,041.74	28,475.86
Total deficit	$ 3,551.85	$ 34,365.96

(2) Atchison, Topeka and Santa Fe Railway Company. (Rec., 159):

Miscellaneous Freight.

Per cent of all freight 00.22%
Per cent of all earnings 00.17%

Miscellaneous Passenger.

Per cent of all passenger 7.48%
Per cent of all earnings 1.86%

	Freight Amount	Passenger Amount
Miscellaneous state earnings	$ 4,608.35	$ 51,320.16
Less revenue proportion of expense 00.22% of freight and 7.48% passenger	3,042.02	42,748.11
Leaving	$ 1,566.33	$ 8,523.05
Less increased cost freight 50%, passenger 25%	1,521.01	9,726.84
Leaving	$ 45.32	Def. $ 1,204.79
Less Taxes and Rentals	71.20	811.88
	Def. $ 25.88	Def. $ 2,016.67
Amount due at 6% interest on portion of value assignable to the state part of traffic	769.65	8,420.90
Total deficit	$ 795.53	$ 10,437.57

(3) Chicago, Rock Island and Pacific Railway Company. (Rec., p. 159):

Miscellaneous Freight.

Per cent of all freight 00.48%
Per cent of all earnings 00.36%

Miscellaneous Passenger.

Per cent of all passenger 8.28%
Per cent of all earnings 2.04%

	Freight Amount	Passenger Amount
Miscellaneous state earnings	$ 4,035.91	$ 22,620.48
Less revenue proportion of expense 00.48% of freight and 8.28% passenger	2,966.88	23,300.06
Leaving	$ 1,069.03	Def. $ 3,679.58
Less increased cost freight 50%, passenger 25%	1,483.44	5,907.98
Leaving	Def. $ 414.41	Def. $ 9,587.56
Less Taxes and Rentals	356.29	1,740.08
	Def. $ 770.70	Def. $ 11,327.64
Amount due at 6% interest on portion of value assignable to the state part of the traffic	1,031.54	5,845.37
Total deficit	$ 1,802.24	$ 17,173.01

(4) Kansas City Southern Railway Company. (Rec., 160):

Miscellaneous Freight.

Per cent of all freight 00.85%
Per cent of all earnings 00.72%

Miscellaneous Passenger.

Per cent of all passenger 6.50%
Per cent of all earnings 1.00%

	Freight Amount	Passenger Amount
Miscellaneous state earnings	$ 7,533.64	$ 10,493.05
Less revenue proportion of expense 00.85% freight and 6.50% passenger	4,856.03	9,193.12
Leaving	$ 2,677.61	$ 1,299.93
Less increased cost freight 50%, passenger 25%	2,428.02	2,107.35
Leaving	$ 249.59	Def. $ 807.42
Less Taxes and Rentals	189.82	242.93
	$ 59.77	Def. $ 1,050.35
Amount due at 6% interest on portion of value assignable to the state part of the traffic	1,736.44	2,411.73
Total deficit	$ 1,676.67	$ 3,462.08

(5) Missouri, Kansas and Texas Railway Company.

(Rec., 160):

Miscellaneous Freight.

Per cent of all freight	00.22%
Per cent of all earnings	00.15%

Miscellaneous Passenger.

Per cent of all passenger	8.17%
Per cent of all earnings	2.38%

	Freight Amount	Passenger Amount
Miscellaneous state earnings	$ 3,547.90	$ 54,885.77
Less revenue proportion of expense 00.22% freight and 8.17% passenger	2,223.42	42,205.40
Leaving	$ 1,324.48	$ 12,680.37
Less increased cost freight 50%, passenger 25%.	1,111.71	9,505.26
Leaving	$ 212.77	$ 3,175.11
Less Taxes and Rentals	261.84	4,776.63
Def.	$ 49.07	$ 1,601.52
Amount due at 6% interest on portion of value assignable to the state part of the traffic...	940.24	14,918.48
Total deficit	$ 989.31	$ 16,520.00

(6) Chicago, Burlington and Quincy Railroad Company.

(Rec., 161):

Miscellaneous Freight.

Per cent of all freight	00.39%
Per cent of all earnings	00.26%

Miscellaneous Passenger.

Per cent of all passenger	8.44%
Per cent of all earnings	2.82%

	Freight Amount	Passenger Amount
Miscellaneous state earnings	$31,743.33	$347,600.91
Less revenue proportion of expense 00.39% freight and 8.44% passenger	26,495.08	297,705.12
Leaving	$ 5,248.25	$ 49,895.79
Less increased cost freight 50%, passenger 25%	13,247.54	66,666.19
Leaving	Def. 7,999.29	Def. 16,770.40
Less Taxes and Rentals	Cr. 47.72	Cr. 519.28
	Def. $7,951.57	Def. $16,251.12
Amount due at 6% interest on portion of value assignable to the state part of the traffic...	8,294.97	89,968.56
Total deficit	$16,246.54	$106,219.68

(7) Chicago, Great Western Railway Company. (Rec., 162):

Miscellaneous Freight.

Per cent of all freight 00.32%
Per cent of all earnings 00.21%

Miscellaneous Passenger.

Per cent of all passengers 5.21%
Per cent of all earnings 1.73%

	Amount Freight	Amount Passenger
Miscellaneous state earnings	$837.23	$6,777.18
Less revenue proportion of expense 00.32% freight, and 5.21% passenger	636.44	6,583.14
Leaving	200.79	194.04
Less increased cost freight 50%, passenger 25% . . .	318.22	1,541.54
Leaving	Def. 117.43	Def. 1,347.50
Less Taxes and Rentals	39.34	589.36
	Def. 156.77	Def. 1,936.86
Amount due at 6% interest on portion of value assignable to the state part of the traffic	227.13	1,871.12
Total deficit	$383.90	$3,807.98

(c) The net result as to each road of doing the miscellaneous business as divided by the state, applying the revenue theory, with and without extra cost, is this:

Road	Entitled to receive	Net with extra cost	Net without
Freight.			
St. L. & S. F.	$ 4,061.74	$ 489.89	$ 6,078.61
A. T. & S. F.	769.65	*25.88	1,494.13
C. R. I. & P.	1,031.54	*770.70	712.74
K. C. S.	1,736.44	59.77	2,368.25
M. K. & T.	940.24	*49.07	1,062.61
C. B. & Q.	8,294.97	*7,951.57	5,295.97
C. G. W.	227.13	*156.77	161.45
Passenger.			
St. L. & S. F.	$28,475.86	*$ 5,890.10	$16,823.13
A. T. & S. F.	8,420.90	*2,016.67	6,710.17
C. R. I. & P.	5,845.37	*11,327.64	*5,418.86
K. C. S.	2,411.73	59.67	2,368.35
M. K. & T.	14,918.48	1,601.52	7,903.74
C. B. & Q.	89,968.56	*16,251.12	50,415.07
C. G. W.	1,871.12	*1,936.86	*395.32

*Deficit.

To ascertain the return upon the miscellaneous and carriage business combined with or without extra cost, it is only necessary to add to the figures set forth in finding 19 (Rec., 5318-5326) those herein enumerated.

(d) To make this still plainer (Original Brief, 237) the figures (Finding 19, Rec., 5318-5326) as to the amount earned, with and without extra cost, upon carriage business are:

Road.	Entitled to Earn.	Earned With Extra Cost.	Earned Without Extra Cost.
Freight.			
St. L. & S. F.	$130,988.97	$ 49,973.87	$181,398.35
A. T. & S. F.	23,089.35	*16,697.72	31,161.83
C. R. I. & P.	38,911.81	*25,911.15	16,008.87
K. C. S.	8,923.38	*1,921.38	9,790.22
M. K. & T.	75,469.96	*1,552.52	64,938.25
C. B. & Q.	409,325.04	*338,099.20	146,030.09
C. G. W.	8,057.70	*5,721.90	3,625.82
Passenger.			
St. L. & S. F.	135,857.42	26,330.13	80,237.49
A. T. & S. F.	17,179.40	*2,313.35	15,634.36
C. R. I. & P.	29,599.34	*44,948.90	*27,447.29
K. C. S.	7,355.76	*2,151.93	3,194.18
M. K. & T.	67,070.48	8,070.60	35,553.19
C. B. & Q.	417,620.02	*33,450.99	124,754.71
C. G. W.	10,545.32	*8,294.55	*2,204.20

*Deficit.

(e) We thus have the state carriage as well as the state miscellaneous business. To put each class together as a whole, all that needs be done is to add the items together. In other words when the state carriage and miscellaneous business are combined the result is this:

Road.	Entitled to Receive.	Net With Extra Cost.	Net Without Extra Cost.
Freight.			
St. L. & S. F.	$135,030.71	$ 50,463.76	$187,476.96
A. T. & S. F.	23,859.00	*10,723.60	32,645.96
C. R. I. & P.	39,943.35	*26,681.85	16,721.61
K. C. S.	10,659.82	*1,861.61	12,158.47
M. K. & T.	76,410.20	*1,601.59	66,000.86
C. B. & Q.	417,620.01	*346,050.77	151,326.06
C. G. W.	8,284.83	*5,878.67	3,787.27
Passenger.			
St. L. & S. F.	$164,333.28	$ 20,440.03	$ 97,060.62
A. T. & S. F.	25,600.30	*4,330.02	22,344.53
C. R. I. & P.	35,444.71	*56,276.54	*32,866.15
K. C. S.	9,767.49	*2,092.26	5,562.53
M. K. & T.	81,988.96	9,672.12	43,456.93
C. B. & Q.	507,588.58	*49,702.11	175,169.78
C. G. W.	12,416.44	*10,231.41	*2,599.52

*Deficit.

It will be thus seen that without extra cost no road received 6 per cent from its passenger business as thus combined. The combined freight business, without extra cost, only brought a 6 per cent return to the St. L. & S. F., A. T. & S. F. and K. C. S. The extra cost figured is that found below 50% for freight and 25% for passenger business. But applying only the 30 per cent extra cost, the minimum figure (Rec., 175-212; Original Brief, p. 218) fixed by the state experts, the freight and passenger returns are both confiscatory.

XII.

State's view as to each road.

(1) The state at some length (State's Brief, Cases 672-701, pp. 125-282; State's Supplemental Brief, Cases 130, 134, pp. 105-109) goes into the figures as to all roads whose cases were tried, except the St. L. K. C. & C. cases Nos. 680, 681; St. L. & H., Cases No. 684, 685, and K. C. C. & S., Cases No. 698, 699. As to these three roads it is (State's Brief, Cases 672-701, p. 279) erroneously stated:

> "We have no figures nor matters sufficient to formulate the problem as to these three roads, the brief in all other respects applying to these roads same as others."

The St. L. K. C. & C., Cases Nos. 680, 681, were *by consent* (Rec., 4686) consolidated with the C. R. I. & P., Nos. 678, 679, the figures of the two companies appearing together. This is shown by the joint report (Rec., 185-189) of the experts. The reason for the consolidation was that pending the trial the C. R. I.

& P. purchased the property of the other company. The rates as to the other two roads were by the joint experts' report conceded (Rec., 196-207) to be confiscatory.

(2) The theories presented by the state's figures were in part erroneous. Those theories were these:

(a) The state freight and miscellaneous business should all be combined as state freight, and the assignable value ascertained by taking such proportion of the entire value in the earnings from this business bore to all the earnings in the state. The railroads did not so combine the business, but ascertained the assignable value upon the same basis. As to the total value there was no difference, between the parties, nor as to the use of the revenue basis with which to obtain the assignable value.

(b) The state passenger carriage and mail and express business were likewise combined and treated as state passenger business. The railroads treated the passenger carriage business separately. The assignable value was ascertained just as in the case of state freight.

(c) From the earnings of the state freight business there was deducted the ton mile percentage of all freight expenses, whereas the court below and the railroads made the deduction upon the revenue proportion. There was next deducted the extra cost estimated at 30 and 50 per cent upon a ton mile basis, whereas the railroads estimated it on the revenue basis and the court below so estimating fixed it at 50%. These were practically the only differences between the parties.

(d) There was in each case next deducted, just as was done below, the diminution there would have been in earnings had the state rates been put in force.

(e) The state passenger earnings being ascertained, there were deducted the expenses ascertained upon a passenger mile

instead of a revenue basis. There was taken from the state expenses 10 and 20 per cent as extra cost of doing the interstate business, whereas below the court found that the state business cost 25 per cent more than the interstate.

(f) There were then no real differences except as to the method of dividing expenses and the amount of extra cost. So the court below expressly found (Opinion, Rec., 5300, 5301; Finding 14, Rec., 5311, 5312). This will be demonstrated by a brief consideration of each case.

(3) Before doing so it may be again remarked that by consent (Rec., 174) two experts were by the court appointed to report the figures upon the respective theories of the parties. This they did (Rec., 175-212) and the figures returned were exactly those shown by the statements upon both sides. This as to each road has already been clearly shown (Original Brief, pp. 58-61, 238-241). The state having arbitrarily divided miscellaneous earnings, they, as divided, are set forth in the joint report of the experts (Rec., 175-212) and are compiled with the respective percentages into the railroads' request 22 (Rec., 157-162) hereinbefore considered (*supra* Div. XI). So upon the assumption of proper division, which the state cannot deny, their relation to other figures is readily seen.

(4) Turning then to the state's brief, it can be easily demonstrated therefrom, as will now be done, that the parties have no differences as to figures. So important is that point that attention will be again given thereto for the state should in all fairness have so conceded:

(5) In cases 672-3, St. L. & S. F., counsel (State's Brief, Cases 679-701) concede:

(a) The valuation of the St. L. & S. F. road is (p. 152) $61,238,414.70, which is exactly that found (Rec., 5311) below,

of which 14.69% or $8,995,923.12 is (p. 155) the assignable state freight value. 14.26% was below found (Rec., 5315) to be the state carriage proportion, while 00.44% is (Request 22, Rec., 159) the miscellaneous proportion.

(b) State freight earnings are (p. 159) $595,146.09 consisting of those from state carriage, as found below (Rec., 5318), $577,192.84, and $17,953.25 miscellaneous Exhibit 64, (Rec., 4984) returned (Rec., 178) by the joint experts as the state's proportion and so conceded by request 22 (Rec., 159). The total freight expenses, exclusive of taxes and rentals, are (p. 160) $1,802,813.26, the exact figures found below (Rec., 5317), and appearing upon the railroad (Exhibit 2, Rec., 4790) and state expert's (Exhibit 64, Rec., 4986) statements.

(c) The state passenger earnings are (p. 158) $724,756.43, consisting as shown by the joint report of the experts (Rec., 178), of the carriage earnings, $599,051.59, found below (Rec., 5318) and set forth in the railroad (Exhibit 2, Rec., 4790) and state expert's (Exhibit 61, Rec., 4984) statements, and $125,704.84, the state's division of the undivided mail and express, $203.077.28, found by the court (Rec., 5316) appearing in the joint report of the experts (Rec., 178), and in the state expert's exhibit 61 (Rec., 4984), as well as in request 22 (Rec., 158). The result is as to the St. L. & S. F. that which has been repeatedly said, there is no difference between the parties as to figures. The methods of division are the sole ground of difference. The same thing is true as to the other roads.

(6) In cases 674-5, A. T. & S. F., counsel (State's Brief, Cases 679-701) make these concessions:

(a) The valuation (p. 127) of the A. T. & S. F. is $15,091,-212, exactly that which was found (Rec., 5311) below; the state freight assignable proportion is (p. 129) 5.27% thereof, or $795,-306.87, which is in fact 5.10% found (Rec., 5315) below to be

the state carriage proportion and 0.17% (Rec., 159) the miscellaneous state freight proportion, as set forth in request 22, the figures in which are taken from the state's exhibit 77 (Rec., 5023) and the joint report (Rec. ,183) of the experts.

(b) The state freight earnings (p. 132) are $145,741.35 consisting of $141,133, found below (Rec., 5315) to be state freight carriage earnings, and $4,608.35 shown in the joint report (Rec., 183) as the state miscellaneous proportion, also set forth by the state's exhibit 77 (Rec., 5023), the calculations being made in request 22 (Rec., 159). The total freight expenses, exclusive of taxes and rentals (p. 134) are $1,382,748.65 which are the exact figures found (Rec., 5317) below and appearing upon the railroad's exhibit 45 (Rec., 4942), and the state experts' (Exhibits 76, 78, Rec., 5022, 5025) statements.

(c) The state passenger earnings are (p. 132) $155,690.35, consisting of carriage earnings, $104,370.17 found below (Rec., 5319) and set forth in railroad exhibit 45 (Rec., 4942) state experts' exhibit 77 (Rec., 5023) and $51,320.16 the state's division of the undivided mail and express set forth in the state's exhibit 78 and joint report of the experts (Rec., 183), as well as request 22 (Rec., 159). The total expenses of the passenger business, exclusive of taxes and rentals, are $572,167.20, which coincides with the finding below (Rec., 5317).

(7) In cases 678-81, C. R. I. & P., counsel (State's Brief, Cases 672-701) concede:

(a) The total valuation (p. 203) to be $19,102,507.59 which is the exact amount (Rec., 5311) found below. The state freight assignable value is (p. 205) 13.95% which consists of 13.58% found below (Rec., 5313) plus 0.36, the per cent of miscellaneous freight properly calculated and set forth in request 22 (Rec., 159). The state passenger assignable value is 12.36% which consists of the passenger carriage found by the court (Rec., 5316) to be

10.33% and 2.04% set forth in request 22 (Rec., 159) as the proportion of passenger miscellaneous business.

(b) The revenue from state freight is (p. 208) $154,989.59 and from the state passenger $137,473.52, these earnings consisting of the state freight, found below (Rec. 5315) to be $150,953.68 and miscellaneous freight $4,035.91 set forth in the joint report (Rec., 188), request 22 (Rec., 159) and the state's exhibit 81 (Rec., 5043). The revenue from the state passenger business consists of $114,853.04 state passenger carriage found below (Rec., 5315) and miscellaneous $22,620.48, set forth in the state exhibit 80 (Rec., 5039), the joint report (Rec., 188) and request 22 (Rec., 159).

(c) The total freight expense is (p. 210) $619,199.73 which is the amount found below (Rec., 5317) while the passenger expense is (p. 211) $317,633.62, which is also the exact amount (Rec., 5317) found below.

(8) In cases 682-3, K. C. S., counsel (State's Brief, Cases 672-701) concede:

(a) The assignable value is (p. 229) $8,039,084.40, the exact amount found (Rec., 5311) below, and the assignable freight value is (p. 231) 4.42%, which is that found below for state carriage (Rec., 5315) 3.70% and .72% for the miscellaneous as set forth in request 22 (Rec., 160). The assignable passenger is (p. 231) 4.05% consisting of 3.05% found below as the passenger carriage proportion (Rec., 5316) and 1% set forth in request 22 (Rec., 160).

(b) The state freight revenue is (p. 234) $46,282.40, consisting of $38,748.76 found below (Rec., 5315) to be the state freight carriage business and $7,533.64, the miscellaneous earnings as shown by state exhibit 86 (Rec., 5058), the joint report (Rec., 193) and request 22 (Rec., 160). The state passenger revenue is (p. 234) $42,358.33, consisting of state passenger carriage found

below (Rec., 5316) to be $31,865.28 and $10,493.05 miscellaneous, as set forth in state's exhibit 85 (Rec., 5056) the joint report (Rec., 193) and request 22 (Rec., 160).

(c) The total freight expense is (p. 236) $571,297.54 which is the exact amount found (Rec., 5317) below, while the total passenger expense is (p. 237) $141,432.56 which likewise (Rec., 5317) was the amount found below.

(9) In cases 691-2, M., K. & T., counsel (State's Brief, cases 672-701) concede:

(a) The total valuation is (p. 177) $20,894,229.93, which is the exact amount found below (Rec., 5311). 12.19% thereof is (p. 178) the assignable proportion of state freight, consisting of the assignable proportion of state freight carriage (Rec., 5315) 12.04% and .15% miscellaneous, shown by request 22 (Rec., 160).

(b) The state freight earnings are (p. 182) $280,964.42 and the passenger $301,254.30, consisting of state freight carriage $277,416.52 found below (Rec., 5323) and $3,547.90 miscellaneous earnings, shown by the state's exhibit 92 (Rec., 5080), the joint report (Rec., 199) and request 22 (Rec., 160) and of the passenger carriage $246,368.53, found by the court (Rec., 5323) and $54,885.77 miscellaneous earnings also shown by the state exhibit 92 (Rec., 5080), the joint report (Rec., 199) and request 22 (Rec., 160).

(c) The freight expenses, exclusive of taxes and rentals, are (p. 184) $1,010,643.55, the passenger (p. 185) $516,589.98, the exact figures found (Rec., 5317) below.

(10) In cases 130, 134, C. B. & Q., counsel, State's Supplemental Brief, Cases 130-134) concede:

(a) The valuation is (p. 85) $53,172,907.83 which is (Rec., 5311) the exact amount found below, and the state freight assignable value thereof is (p. 85) 13.09% which is the 12.83 percentage

of state passenger carriage found (Rec., 5315) below and the miscellaneous proportion .26% set forth in request 22 (Rec., 161). The state passenger assignable value is 15.91% which is the 13.09% of passenger carriage earnings found (Rec., 5316) below plus 2.82% for miscellaneous set forth in request 22 (Rec., 161).

(b) The state freight revenue (p. 87) is $1,612,272.97, consisting of $1,580,529.64 found below as the state freight carriage (Rec., 5315) and $31,743.33 miscellaneous set forth in the state's exhibit 103 (Rec., 5101), the joint report (Rec., 205) and request 22 (Rec., 161). The state passenger revenue is (p. 88) $1,959,303.83, consisting of $1,611,702.92 found (Rec., 5316) below and the miscellaneous part $347,600.91 set forth in the state's exhibit 104 (Rec., 5104), the joint report (Rec., 205) and request 22 (Rec., 161).

(c) The total freight expenses, less taxes and rentals, are (p. 90) $6,665,746.38 and the total passenger expenses are (p. 90) $3,398,575.14. These figures do not exactly correspond with the amounts found below (Rec., 5317). The reasons for the slight difference having been already shown (Original Brief, p. 251) to be because the state did not deal with rentals in the same manner as the railroad. The total expense (Exhibits 103, 104, Rec., 5102, 5104), shown by the state, totaled $10,320,921.41, while that shown by the railroad was $10,301,534.53 (Exhibit 98, Rec., 5091). The difference was not one of substance and when understood the figures were the same. Anyhow, the railroad figures were by the state expert admitted (Rec., 4767) to be correct.

(11) In cases 700-701, C. G. W., counsel (State's Brief, Cases 679-701) concede:

(a) The valuation is (p. 225) $3,605,236.38 which exactly agrees with the finding below (Rec., 5311). The assignable percentage for state freight is (p. 257) 7.67%, which is the 7.45%

found for state carriage business (Rec., 5315) and .21% computed in request 22 (Rec., 162). The state passenger assignable proportion is (p. 257) 11.48% which consists of 9.75% passenger carriage proportion found (Rec., 5316) below and 1.73% set forth in request 22 (Rec., 162).

(b) The state revenue is (p. 259) $29,966.59, consisting of the state carriage freight $29,129.36 found below (Rec., 5315) and $837.23 miscellaneous, set forth by state exhibit 109 (Rec., 5118), the joint experts' report (Rec., 211) and request 22 (Rec., 162). The state passenger revenue is (p. 260) $44,882.21, consisting of $38,105.03 found below as the carriage proportion (Rec., 5316) and $6,777.18 miscellaneous, set forth in state exhibit 108 (Rec., 5115), by the report of joint experts (Rec., 210) and request 22 (Rec., 162). The total freight expenses are (p. 262) $198,887.69, and the passenger (p. 263) $126,355.88 which figures accord exactly with the finding below (Rec., 5317).

(12) Thus it clearly appears that there are no differences between the parties as to figures. In every instance the totals agree. The real and substantial difference is how much of the total expense should be assigned to state business. With this kept in mind there is no difficulty in solving these cases.

XIV.

Expenses should have been first divided upon the revenue, as distinguished from the ton and passenger mile bases suggested by the state.

(1) This proposition is controverted by counsel (State's Brief, Cases 679-701, pp. 284-302; Cases 130, 134, pp. 122-142),

though the findings of fact (Rec., 5309-5311) are clearly to that effect. Presumptively this finding is correct (Original Brief, pp. 122-127). It need only be shown that there was substantial evidence to support the finding. Here, however, it was overwhelmingly one way (Original Brief, pp. 194-198). The courts very generally (id. 181-194) have approved the method. The state, to support its theory, called two witnesses (Taliaferro, Rec., 899-901, 3259-3267, 4519-4522), (Ludlam, Rec., 1160-1199, 3039). Beyond these they depended upon statements upon cross examination of three of the state experts (Henry A. Gray, Rec., 619-633, 641-690; Henry Miller, Rec., 2836-2906; H. G. Clark, Rec., 1646) that the extra cost should be upon a ton mile basis with such a very large multiple for extra cost that the total percentage to be applied was greater than that found below. Upon the other hand, the overwhelming weight of the evidence was that the first or equal division of expenses should be upon the basis of revenue. A succinct summary of the reasons was given (id. 194-197) in Johnson's exhibit 55 in the Missouri Pacific case (Rec., 2452) adopted and enlarged upon by the Sturgis exhibit 41 (Rec., 1441-1445). These exhibits with the judicial opinions from which quotations (Original Brief, pp. 181-194) have already been made, deal with the reasons for the view adopted below (Finding 6, Rec., 5309) upon an elaborate opinion (Rec., 5298-5299) by the trial judge. At the final trial below, upon oral direct and cross examination the experts spoke in no uncertain terms (Carl Gray, Rec., 3929-3939, 3940-4034; C. J. McPherson, Rec., 4288-4307; W. T. Tyler, Rec., 4099-4112; W. H. Whittenton, Rec., 4390-4399; William Ellis, Rec., 4194-4220; B. H. Bethard, Rec., 4047-4098; W. B. Doddridge, Rec., 3814-3823; J. W. Kendrick, Rec., 4399). Upon the hearing before the master as to the act of 1905, the experts were equally emphatic (C. I. Sturgis, Rec., 229-425, 707-709, 1078-1133; Howard Elliott, Rec., 425-492; George B. Harris, Rec., 536-554; Darius Miller, Rec., 605-618; Geo. H. Crosby, Rec., 555-

558, 846-847; W. C. Stith, Rec., 1465-1542, 1770-1773; W. B. Doddridge, Rec., 1568-1629, 1647-1654, 1769-2273; B. C. Buell, Rec., 1794-1799, and B. H. Bethard, Rec., 1821-1834). It would serve no purpose to set out all that was said by these witnesses in support of their views. If there is to be a review of the finding of fact upon this subject, it should be thorough and include all that the witnesses have said upon the subject. For this, this court must turn to the record; when that is done, there can be, as there was below, but one answer.

(3) The ton mile theory in results shows that it cannot, for the reasons given by the courts and the experts, be the right method for dividing the expenses as between state and interstate business. The actual ratio of expenses to earnings upon all state business is far in excess of that ascertained upon the ton mile basis (Original Brief, p. 223). This proves something wrong with the state's theory. For instance, though state expenses are more than interstate, as every expert conceded, and as has been said by every court which has spoken upon the subject, yet the ratio of expenses to earnings on all the freight business of the K. C. S. is (Original Brief, p. 223) 67.07%. Upon the ton mile basis the state freight as claimed by the state is only 14.30%. Upon the state's own theory (Joint Expert Report, Rec., 194) all state freight earnings are $46,282.40; all state freight expenses, on ton mile percentage, are $6,398.53, plus taxes and rentals, $250.11, plus 50% extra cost, $3,142.14, equaling $9,790.78, which to all earnings, $46,282.40, is but 21.15%. Upon the C. R. I. & P., the total freight earnings, combining, as does the state (Rec., 189) both carriage and miscellaneous, are $154,989.59. The expenses divided as claimed by the state (Rec., 189, 190) are ton mile proportion of expense $47,121.10; taxes and rentals, $5,648.70, and 50% extra cost, $20,990.87, or a total of $73,760.67, or 47.58% of revenue as against an actual percentage of 82.62 upon all freight. Upon

the A. T. & S. F., it is 61.40% as against 68.70%. The percentages as to the other roads will be found equally persuasive. There have been heretofore compiled (Original Brief, p. 223) tables showing the actual percentages of expenses of freight to earnings found below (Rec., 5315) as compared with the percentage of expenses of state freight and state passenger *carriage* ascertained upon a ton and passenger mile proportion. These show the actual ratio of all freight expenses to all freight earnings ranging on all the roads from 65.71% to 82.88%, and that upon the ton mile basis they range from 18% to 49%. We now compile another table showing in the first column the actual percentages of all freight expenses to all freight earnings exactly as found below (Finding 17, Rec., 5315); in the second the percentages calculated upon the state's actual figures (Rec., 175-212) of all state freight earnings, carriage and miscellaneous, and all expenses, without extra cost, upon a ton mile basis plus the taxes and rentals. In the third column, the percentages are found after adding and allowing the extra cost of 50% estimated by the state:

	Actual ratio on all freight	Ratio on state figures without extra expense	With state's 50% extra cost.
St. L. & S. F.	65.71	41.73	57.31
A. T. & S. F.	68.03	42.14	61.40
K. C. S.	67.07	14.36	21.15
C. R. I. & P.	82.62	34.04	47.58
M. K. & T.	69.24	42.41	58.57
C. B. & Q.	82.88	44.67	63.66
C. G. W.	81.04	40.86	69.23

The ton miles of C. G. W. were only guessed at (Rec., 4779) by taking those of the St. L. & S. F., which possibly accounts for the percentage with extra cost reaching so high a figure. These freight percentages would be very much reduced if there were deducted the diminution of state freight earnings which made (Original Brief, pp. 18-19, 199-201) substantial reductions of the total carriage revenue.

(4) The state's combination of freight carriage earnings with miscellaneous, consisting of switching, storage and demurrage, and the passenger carriage with mail and express, shows that neither the ton nor passenger mile method is correct. Ton miles have no relation to the number of cars switched, nor to the delays for which demurrage is charged, and therefore should not be applied. The number of miles a passenger is carried has no relation to the expense of carrying mail and express. This was by Judge Hook (*M. K. & T. R. Co.* v. *Love*, 177 Fed Rep., 493, 499) made so plain that no one can fail to understand it.

(5) No other method of division was suggested below. As presented by the parties the basis of the first division was either revenue or ton and passenger miles.

(6) It is repetition, but one which cannot be too often made, that upon the revenue basis of dividing expenses no passenger business of any road brought a six per cent return. This too without extra cost and whether figured upon state carriage business alone (Original Brief, p. 201) or by adding the mail and express business as divided by the state (*supra* Div. XI). Upon state freight business with expenses divided upon a revenue basis, the St. L. & S. F., A. T. & S. F. and K. C. S. alone received a sum slightly in excess of six per cent. This, whether state carriage business be considered alone (Original Brief, p. 201) or with miscellaneous earnings divided according to the state's theory (*Supra*, Div. XI). By adopting the lowest estimate of the state of 30% as the extra cost of doing state business, the return as to these roads is confiscatory. This again whether one deals with the state carriage business alone (Original Brief, pp. 201, 218, 237) or with it when combined with miscellaneous (*supra*, Div. XI) as divided by the state. So, if there be taken all business of every kind and character, state and interstate, (Original Brief, pp. 234-

236) the return as to each is, upon the revenue basis, less than six per cent, save and except in the cases of the St. L. & S. F., A. T. & S. F. and K. C. S. If there be allowed for these three upon their state carriage business extra cost for state freight alone, at the lowest figure estimated by the state for state freight only, 30%, the rate of return upon all state business is confiscatory as to them (Original Brief, pp. 234-236). The same result follows if the state's method of combination be adopted (*supra* Div. XI.)

XV.

Extra Cost.

(1) This subject is really wholly immaterial as to any of the eighteen roads except the St. L. & S. F., A. T. & S. F. and K. C. S. and the C. M. & St. P., if the revenue basis of division be right. The case of the latter was (Rec., 4724) to abide the result of the St. L. & S. F. The subject is so immaterial as to the fourteen other roads, because the rates failed to bring a six per cent return to them, whether state carriage business was separately considered (Original Brief, p. 201) or such carriage business was combined with miscellaneous (*supra*, Div. XI) even as erroneously (Rec., 5313, 5314) divided by the state, or whether all state carriage business was considered as a whole (Original Brief, p. 234). The very lowest extra cost upon freight conceded by the state was 30%. The state experts testified to this percentage (Ev. Ludlam, Rec., 2005, 2006; Taliaferro, Rec., 3260, 4593). It was written in each freight statement returned by the state's expert (Exhibit 64, 77, 81, 86, 92, 103, 109, Rec., 4984, 5023, 5043, 5058, 5080, 5101, 5118) and was conceded as to each road in the report of the joint

experts (Rec., 175-212) as well as in counsel's brief (State's Brief, Cases 677-701, pp. 147, 174, 199, 225, 246, 274; State's Supplemental Brief, Cases 130, 134, p. 109). This 30% as to the St. L. & S. F. (Rec., 180) was $59,132.25, the A. T. & S. F. (Rec., 184) $17,007.81, and the K. C. S. (Rec., 194) $1,885.28. If deductions in these sums be made from the state freight earnings, then there is not a six per cent return upon the state business of these roads whether the state carriage business be considered separately (Original Brief, p. 234) or as combined with miscellaneous upon the state's division (*supra*, Div. XI), or the state carriage business be considered as a whole (Original Brief, pp. 234-236). Such an admission made at the beginning, as it was before the end of the trial, would have saved time, confusion, expense and worry and left the cases to be determined solely by the question as to whether the first division of expenses should have been upon the mileage basis. Therefore, in the end, little need be said upon the subject of extra cost, because just as was done in *Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819, the extra cost can, for the purposes of the case, be taken at the state's own figures.

(2) That it does cost more to do the state business than the interstate has been conceded by every court (Original Brief, pp. 203-210) which has considered the subject, and by every expert (id. pp. 210-215) who testified about the matter. Wherever the subject has been considered, or whatever the theory adopted, there has always been adopted a substantial sum as such extra cost (id., pp. 224-232). The findings below of 50% for freight and 25% for passenger are overwhelmingly sustained by the evidence (Original Brief, pp. 210-218).

(3) It is forcefully contended that the extra cost should be mellowed by the extra revenue per mile received from the state

freight business. This subject has been fully considered (Original Brief, pp. 224-232). The multiple of freight extra cost fixed by the experts (id., pp. 210-212) was from two to four times upon a revenue division and much more if the first or original cost were ascertained upon a ton mile basis. The state passenger extra cost was by the experts fixed (id.) at a higher rate than the 25% allowed below. The court below, in the excess of caution, and to allow for everything, including the alleged extra state revenue per mile, especially on the freight business, found (Findings 7, 8, Rec., 5310-5312) the extra freight cost to be 50% and the passenger at 25% when the original or first cost was apportioned upon the basis of revenue. Whatever the sum fixed for extra cost when the first division is made upon the revenue basis, this extra revenue is cared for. There is no such thing as extra revenue except per mile. The short haul, upon mileage rates, pays a higher rate *per mile* than the long haul. In the state business, the percentage of short haul business is greater than the long haul. Hence it is generally, but only in such sense, said that the mileage state rates bring a higher return per mile than the interstate. The reason is because the percentage of long haul is greater in the latter case. This is especially true as to the state freight rate laws which, like those in question, allow a higher rate for the first few miles than the subsequent mileage. All this was taken into consideration in the percentages fixed below. Upon this question each of the experts was examined to the fullest extent so that the court was sufficiently advised, and very properly held that the ultimate result to be reached was to assign as state expense such sum, all things considered, as was fair, just and representative and brought a fair result.

(4) It is finally said that *all* the state experts testified that their opinions of extra cost were based entirely upon the short as compared with the long haul business and not as between state and interstate business. This was far from true. The terminal

freight expense is about 25% of all the expense. The use of terminals in the C. R. I. & P. case was (Exhibit 46, Rec., 4959, 4960) for state passenger 88% as against 12% by interstate. The state business must always bear the burden of two terminals. There is a class of interstate business called trans-state, which both originates and terminates outside of the state. This practically has no terminal expense. There is another class of interstate business which either originates or else terminates within the state. As to this, there is the expense of one terminal only. So upon the subject of terminal expense alone the extra cost was enormous. The length of the haul bears no relation thereto. The experts were examined at length upon this subject, and testified in great detail in relation thereto (Original Brief, pp. 210-218). At Kansas City alone the freight terminal expense was $783.647.66 or more than 10% of all the expenses of the road in the state (Exhibit 56, Rec., 2462) aggregating $6,361,294.80. At St. Louis, about three times the size of Kansas City, it was probably twice as much. At every station upon this road there was a proportionate amount of terminal expense.

(5) The terminal expense was, however, far from all of the extra cost. That arises in so many ways and out of so many things that it is difficult to enumerate them. Each expert made an enumeration. It is sufficient here to refer to those who testified orally at the final trial and went into the subject in great detail (Ev. W. B. Doddridge, Rec., 3815; Carl Gray, 3929; B. H. Bethard, 4037; W.T.Tyler, 4099; W.M.Whitenton, 4140; Wm. Ellis, 4194; C. J. McPherson, 4276; P. S. Eustis, 4367; J. W. Kendrick, 4390; James Peabody, 4404). Before the master many other witnesses (Original Brief, pp. 210-212) went into the subject. With *some*, not all, of the extra cost comes from the fact the haul is short instead of long. Of course, that in and of itself would not necessarily mean that state business was necessarily more expensive than interstate. But the short haul state business was *in propor-*

tion to *all* state business, very much larger than it was with the interstate. The expert was therefore enabled to estimate the difference in cost as between state and interstate business. Those experts who testified orally at final hearing expressly made the distinction plain. Moreover, tests were made and applied confirming the view that *proportionately* to all business the state short haul was very much larger than the interstate (Ev. Kimbell, Rec., 4167-4178 with exhibits; Peabody, Rec., 4404-4448; Doddridge, Rec., 1568-1630, 1647-1655, 1769-1774, 3767-3815; H. Roth, 1564-8; 1729-33, 1848, 2272, 2312, 2357; Frank Nay, 4456-4478, 4645). Many of the elements entering into extra cost have been forcibly stated by Mr. Justice Brewer (*C. M. & St. P. R. Co.* v. *Tompkins,* 176 U. S., 167, 178, 179), Judge Hook (*M. K. & T. R. Co.* v. *Love,* 177 Fed. Rep., 493, 499, 500), Judge Sanborn (*Shepard* v. *Nor. Pac. R. Co.,* 184 Fed. Rep., 765, 813-815) and Judge McPherson below (Opinion, Rec., 5296, 168 Fed. Rep., 317, 348, 349). In the end as Mr. Justice Brewer said the amount is *dependent* upon the "opinion of experts familiar with railroad business" which "cannot be disregarded." The witnesses (Original Brief, 210-214) spoke in no uncertain terms upon the subject. Their reasons included many of those given in Johnson's Exhibit 55 (Rec., 2452, Original Brief, 194-197) and the Sturgis Exhibit 41 (Rec., 1441-5). Without quoting from the record some of the other reasons given by the witnesses may be thus summarized:

1. In all instances the state business has the expense of one additional terminal; sometimes two.

2. Short haul of state business is proportionately to all state business much greater than the interstate proportionately to all interstate business in the state.

3. There is a large increased percentage in use of cars and other equipment required to move a given amount of freight in the state business.

4. Return movement of empty equipment, and consequent loss in use or earning power is far greater in the state business.

5. There is a great lack of state business at local stations to work properly and efficiently thereat. A railroad company could well and would dispense with many of its local stations if it were not obliged to handle state business, by handling what little interstate that might be offered under "prepaid station" arrangements.

6. The local train service is of an extra expensive character requiring extra speed between stations and extra wages to be paid for mileage not in fact covered, but allowed for switching and over-time. While a large part of state business is carried on through trains, that portion is insignificant when compared to the total volume handled thereon.

7. There is an extra casualty risk in state traffic to both equipment and freight.

8. Local trains run by daylight only, thus losing the time and mileage of engines. They stop at every station, increasing the cost of service, also the wear and tear on equipment. There is always a lighter loading of those trains and loads continuously decrease from station to station to the end of the run. Of the business done upon the local trains the proportion of the state business is far greater than the interstate.

9. The loss of tonnage on account of short loads set out and picked up is far greater with the state business.

10. Running repairs to equipment in local trains are made during nights and on Sundays, for which mechanics are paid time and one-half, thus creating a larger expense.

11. Trains are required to run daily to accommodate state traffic regardless of whether there is any traffic to move or not, causing much extra cost.

(6) I. G. Rawn before the master (Rec., 567) testified alone to the difference in the extra cost of the short or local as distinguished from the long or through haul, without giving an estimate as between the state and interstate business. Counsel made quotations (State Brief, Cases 679-701, pp. 315-330; State's Supplemental Brief, Cases 130, 134, pp. 155-170) from *some* other witnesses before the master who on cross examination said that a large portion of the extra expense came from the short haul business. But the same witnesses said that considering the proportions of the short and long haul to all state and interstate business respectively their opinions as to extra cost of the short haul business applied to the state business. Thus a quotation in the state's brief (p. 316) is made from Howard Elliott (Rec., 427) to the effect that he was in his estimate comparing the short and long haul business, but there is omitted these further statements (Rec., 484) of the witness:

"Q. Mr. Elliott, you said the word 'local' in railroad parlance would cover a class of business that would be interstate business; you recall that?

A. Yes.

Q. Is that a large or a small part Missouri business?

A. It is a very small part, in my judgment.

Q. When we use the word 'local' in asking your expert opinion we meant state freight as distinguished from interstate freight business, and we are led to use the word, because as shown on page 51 of the record, it was suggested that the word should be so used in this litigation; now what do you say as to how much more it costs to do the state freight business as it does to do the interstate freight business? Using those terms instead of the word 'local' as used by us?

A. I should make the same reply as I did on the other examination. Taking everything into consideration, it costs to do the state business anywhere from three to six times as as much to do the interstate business.

Q. I believe you expressed the opinion that it costs at least three times to do the interstate freight business, taking as a basis a division of expenses upon the basis of revenue?

A. I did."

It is quite unfair for the state to *now* claim that the witnesses by use of the words local and through business did not mean state and interstate business and there to prove the contention, cite extracts from the evidence taken before the master. At the beginning of that hearing this (Rec., 243) appears:

> "Mr. Hadley: I have been endeavoring to get some agreement of counsel about the terms that we should use in applying to the same thing, in order that there may be no misunderstanding between counsel, the witness and myself. That which is known as intrastate or state business, is designated in the statements of the Burlington from which Mr. Sturgis is now testifying as 'local' business; and yet what is known as local freight is an entirely different thing from the standpoint of railroad terminology, as I am informed, than interstate freight would be.
>
> Mr. Hagerman: The expert has used certain terms in his statement.
>
> Mr. Hadley: I simply want to avoid confusion by seeing that we understand the same thing.
>
> The Master: I understand the term 'local,' as used in this paper by the witness, to mean local in the state.
>
> Q. (By Judge Spencer): Is that right, Mr. Sturgis, that the term 'local' means intrastate? A. Yes."

Every expert except I. G. Rawn made this point particularly plain. He had given the point of distinction no particular attention. In giving their evidence orally at the trial the experts made plain the points, that after considering *all* things including the proportion that local business was to through, their estimates were of extra cost of state over the interstate business. This, was also true with the possible exception of Rawn, Miller and Clark, of all state experts before the master. The references to this evidence have already been made (Original Brief, pp. 210-214).

Respectfully submitted,

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